Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, LOCAL 8141,
Petitioner,

v.

HERMAN O. TOOLEY, EDWARD J. HELT, ARNOLD G. BAKKE, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 exempts employees who object on religious grounds to paying union dues from the obligation of all employees to pay dues stated in a union security clause of a collective agreement?

2. Whether the holding below—that a union does not suffer "undue hardship" within the meaning of Section 701(j) of Title VII unless and until the cost of accommodating religious practices threatens the union's "maintenance or operation"—is inconsistent with this Court's holding in *Trans World Airlines v. Hardison*, 432 U.S. 63, 84, that any cost "more than . . . *de minimis*" is an "undue hardship" under Section 701(j)?

3. Whether, if Title VII provides an exemption from dues obligation for religious objectors, thereby requiring other employees to subsidize union representation for religious objectors, the title is to that extent invalid under the Establishment Clause of the First Amendment?

LIST OF PARTIES

In addition to the parties listed in the caption, Martin-Marietta Corporation and United Steelworkers of America, AFL-CIO, were defendants in the district court. That court dismissed the action against United Steelworkers of America, AFL-CIO (App. 16a), and it was not a party on the appeal. Martin-Marietta Corporation did not appeal the district court's decision, and did not participate in the court of appeals, but was shown as a nominal party on the caption in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United Steelworkers of America, Local 8141 (hereinafter "the Union") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Herman O. Tooley et al. v. Martin-Marietta Corporation, et al.*, 648 F.2d 1239. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supports the request for a writ of certiorari. This petition, which is the joint product of petitioner and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens of the Court by stating their common position only once.

OPINIONS BELOW

The district court's opinion is reported at 476 F.Supp. 1027, and is reprinted as Appendix B. The district court's judgment is unreported, and is reprinted as Appendix C. The court of appeals' opinion is reported at 648 F.2d 1239, and is reprinted as Appendix A.

JURISDICTION

The court of appeals issued its opinion and judgment on June 22, 1981. This petition is filed within 90 days

of that date. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-(j), provides:

> For purposes of this title—
>
> * * * *
>
> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides:

> (c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify, its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), provides in pertinent part:

(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . .

The First Amendment to the Constitution of the United States provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

STATEMENT OF THE CASE

Introduction

At issue in this case is the claim of several Seventh Day Adventists that, because they have religious objections to providing financial support to unions, Title VII of the Civil Rights Act of 1964 exempts them from the obligation imposed upon all employees at their plant to pay union dues as a condition of employment—an obligation established in the union security provision of the collective agreement applicable to their plant. The court below held that Title VII's requirement of "reasonable accommodat[ion]" of religious beliefs and practices requires such an exemption, notwithstanding Congress' express sanctioning of union security provisions in Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3). The court further held that the consequent loss to the union of $1,200 each year did not constitute "undue hardship" within the meaning of Title VII (which does not require "reasonable accommodation" where an "undue hardship" would result), because the receipt of that money was not "necessary for [the union's] maintenance or operation." Finally, the court held that its construction of Title VII to require a religious preference of this magnitude did not place the statute in conflict with the Establishment Clause of the First Amendment. The union seeks review of each of these holdings.

Facts

The three plaintiffs (respondents here) are employed by Martin-Marietta Corporation ("the company") at its plant in The Dalles, Oregon. The union is the exclusive bargaining representative of the employees at that plant. In October, 1976, the company and union negotiated an agreement containing a union security provision, requir-

ing all employees, as a condition of employment, to join the union within 30 days.

Each of the respondents is a Seventh Day Adventist. Each sincerely adheres to that Church's belief that supporting a union is inconsistent with loving one's employer, and thus violates "the biblical directive that a Christian love his neighbor as himself." Shortly after the union security provision was adopted, each of the respondents made known his religious objection to joining or paying dues to the union. In ensuing discussions, the union stated that it would not insist that respondents join the union, but that it would insist that respondents pay a fee to the union in an amount equal to monthly dues in compensation for the representational services which the union, as exclusive bargaining representative, is required to provide respondents. Respondents, although acknowledging that they derive direct and substantial economic benefit from the union's representational services, refused to pay a service fee to the union, offering instead to pay an amount equal to dues to a non-religious charity. The union would not accept this offer.

In the face of warnings that their unwillingness to pay an amount equal to dues to the union might lead to their discharge, respondents instituted this action alleging that enforcement of the union security provision against them would constitute religious discrimination violative of Title VII. The parties agreed that pending resolution of the action respondents would make payments in the amount of dues to a special savings account maintained at the plant, and that the union would not seek respondents' discharge. While the suit was pending, two more Seventh Day Adventist employees began making payments to the special savings account rather than to the union. There is at least one more (i.e. a sixth) Seventh Day Adventist employed at the plant, but as of the date of trial he was paying dues to the union.

The annual dues obligation of the six Seventh Day Adventists was nearly $1,200. At the time this dispute

arose, there were approximately 350 employees at the plant.[1] The union's actual dues receipts were $28,627 in 1976, $32,517 in 1977, and $45,943 in 1978; and these receipts exceeded expenditures in those years by $4,696 in 1976, $1,713 in 1977, and $1,729 in 1978.[2] The union sought to accumulate a reserve in anticipation of the costs of arbitrating cases. (The union had not yet taken a grievance to arbitration, and the above figures thus did not reflect any costs for arbitration; with respect to each grievance taken to arbitration, the union would incur substantial costs for the arbitrator's fee and expenses, and for reproduction of the transcript of the arbitration hearing).

The District Court's Decision

The district court held that the union "did not make a good faith effort to reasonably accommodate plaintiffs' religious beliefs," because it "insisted that plaintiffs pay the equivalent of union dues" (App. 19a). The court rejected the union's contention that Congress had not intended in Title VII to require exemption of religious objectors from the obligation to pay dues pursuant to union security agreements sanctioned by Section 8(a)(3) of the NLRA, reasoning:

> Title VII, which was enacted after the closed shop provisions of the NLRA, prohibits religious discrimination regardless of any otherwise lawful object of the discriminatory practice. [*Id.* 16a].

The union's contention that it would suffer an "undue hardship" were it required to forego those dues, was

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[1] Because the Comuany expanded the workforce in 1978, the number had risen to approximately 540 by the time of trial.

[2] The district court's opinion states that in 1978 the union's income exceeded expenses by $4,300 (App. 20a). The court overlooked that the union spent $2,545 in 1978 to purchase a copying machine and typewriter.

dismissed as "frivolous". (*Id.* 20a). The court reasoned that at most the union would be foregoing $1,200 per year; that its income had exceeded expenses in the three prior years; that its perceived need of a reserve "to be prepared for litigation" (apparently a reference to the testimony respecting arbitration cases) was "patently frivolous"; and that the "likelihood that the union will ever be burdened by the few members who refuse to pay union dues because of religious beliefs is remote". (*Ibid.*)

Based upon these findings, the court concluded that the union had violated Title VII by seeking to compel respondents to pay an amount equal to dues. The union's argument that Title VII as thus construed and applied violated the Establishment Clause of the First Amendment was rejected. (*Id.* 17a-19a).

The court entered a remedial order enjoining the union and employer from discharging respondents for refusing to make payments to the union so long as they made monthly payments to the American Cancer Society in amounts equal to union dues. (*Id.* 22a). The court also ordered the union to pay $5,000 attorneys fees to plaintiffs (*ibid.*), an award that, ironically, wipes out most of the "reserve" upon which the court had relied in finding that the loss of plaintiffs' dues would not cause the union "undue hardship."

The Court of Appeals' Decision

The court of appeals affirmed. It rejected the union's contention that Congress had not intended in Title VII to disturb the congressional judgment in the NLRA to sanction collective agreements requiring *all* employees to contribute to the cost of representational services. (App. 4a-5a).[2a]

[2a] The court noted that in December, 1980 (several years after the events that are the subject of this lawsuit) Congress amended the NLRA "to require an accommodation" which the court char-

In holding that the union had not demonstrated that it would suffer "undue hardship" from the loss of $1,200 each year, the court cited the district court's finding that the union's dues receipts had exceeded its expenditures in each of the three preceding years (*id.* 6a); declared that a claim of undue hardship "must be supported by proof of 'actual imposition on co-workers or disruption of the work routine'" (*id.* 7a); and concluded that the proof here was deficient because

> [t]he Steelworkers have not established that the 'substituted charity' accommodation, as applied here, will deprive the union of monies *necessary for its maintenance or operation.* [*Id.* 8a; emphasis added].

Finally, the court rejected the union's contention that Title VII as thus construed violated the Establishment Clause of the First Amendment. The court saw this as an appropriate occasion for "[g]overnment[al] . . . accommodat[ion of] the beliefs and practices of members of minority religions without contravening the prohibitions of the Establishment Clause," (*id.* 9a), and it thought the "inevitable burden" placed on other employees to be constitutionally permissible, noting that in *Gillette v. United States*, 401 U.S. 437, this Court upheld the exemption of religious objectors from military conscription "despite the effect of requiring nonobjectors to serve in their stead" (*id.* 13a).

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acterized as "virtually identical to that requested by the plaintiffs" (App. 4a). That subsequent legislative action, the court reasoned, demonstrates "that the substituted charity accommodation effects a reasonable reconciliation between section 8(a)(3) of the NLRA and Title VII" (*id.* 5a), and "constitutes a sufficiently 'clear and express indication from Congress' that any alleged unequal treatment between employees from the 'substituted charity' accommodation *is permissible under Title VII*" (*id.* 6a, n.5, emphasis added).

REASONS FOR GRANTING THE WRIT

This case presents three issues that warrant this Court's consideration.[3]

First, the court below and three other courts of appeals,[4] have construed Title VII's "reasonable accommodation" provision to require the exemption of religious objectors from the obligation to pay dues under union security agreements sanctioned by the NLRA, and thus to require the other employees to subsidize the provision of union representational services to religious objectors. But the legislative history leaves no doubt that Congress chose to regulate this subject under the NLRA, and did not intend in Title VII to overturn or alter the decisions it reached under the NLRA. Thus, as in *Trans World Airlines v. Hardison*, 432 U.S. 63, 79, the lower courts have misconstrued Title VII to undercut congressional decisions that "lie[] at the core of our national labor policy." In 1980, after decades of refusing proposals to create a dues exemption for religious objectors under the NLRA, Congress opted to amend the NLRA to create a form of exemption, but one that differs both substantively and in its means of enforcement from the exemption the lower courts erroneously have imported into Title VII. Certiorari is warranted so that this Court may remove Title VII and the EEOC from an area that

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[3] The first and third questions presented herein are also presented in *Smith Steel Workers v. Nottelson*, petition for certiorari pending, No. 81-323. As the same counsel prepared the petitions in *Smith* and this case, the discussion of the first and third questions herein parallels the discussion in the *Smith* petition.

[4] Fifth Circuit: *Cooper v. General Dynamics*, 533 F.2d 163 (1976), cert. denied, 433 U.S. 908; *but see* 533 F.2d at 175-176 (Rives, J., concurring in part and dissenting in part).

Sixth Circuit: *McDaniel v. Essex International*, 571 F.2d 338 (1978).

Seventh Circuit: *Nottleson v. Smith Steel Workers*, Nos. 80-1678, 80-1705 (7th Cir., Feb. 27, 1981), *petitions for certiorari pending*, Nos. 81-97, 81-323.

Congress intended be regulated in a different manner by a different agency.

Second, the court below has given a definition to the term "undue hardship" in Title VII that is inconsistent with this Court's construction of that term. The court below has held that a union will not suffer "undue hardship" absent proof that the monies lost by accommodating religious dues objectors are "necessary for [the union's] maintenance or operation." But in *TWA v. Hardison*, *supra* at 84, this Court ruled that any cost "more than *de minimis* . . . is an undue hardship."

Third, the court below has upheld under the Establishment Clause a law that, as that court construed it, "single[s] out a class of . . . citizens for a special economic benefit" on the basis of religion. This Court has consistently ruled that laws with that feature violate the Establishment Clause. *Sloan v. Lemon*, 413 U.S. 825, 832. The court below thought its contrary holding justified by *Gillette v. United States*, 401 U.S. 437, wherein this Court approved the exemption of conscientious objectors from military proscription. But this Court has never applied *Gillette* in a financial subsidization context, and the question whether *Gillette*'s rationale requires an exception to the doctrine stated in the *Sloan* line of cases is one that should be decided by this Court.

I. The Relationship Between Title VII and the NLRA

Congress' determinations concerning the legality of various forms of union security are a central component of the national labor policy. As the Senate Report on the legislation that emerged as the Labor Management Relations Act of 1947 observed, "[a] controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership." S. Rep. No. 105 on S.1126, 80th Cong., 1st Sess., p. 5. The outcome of the 1947 debate was to make the closed shop unlawful, to permit, as a

matter of federal law, employers and unions to negotiate union shop and agency shop agreements, and to grant the states the option of enacting laws invalidating such agreements. See §§ 8(a)(3) and 14(b) of the NLRA as amended. "It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security." *Machinists Local v. Labor Board*, 362 U.S. 411, 418, n. 7.

At the time this case arose it was established that the NLRA permitted union security agreements that require *all* unit employees "to pay their way" (*Labor Board v. General Motors*, 373 U.S. 734, 740-741 (1963)) by providing financial support for the exclusive representative obligated to serve all those employees equally (*Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). Indeed, claims by religious objectors that Congress' sanctioning such agreements violates the Free Exercise Clause of the First Amendment had been uniformly rejected, the courts finding a "compelling governmental interest" in "requir[ing] a fair sharing of the costs of collective bargaining." *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir. 1971), *cert. denied*, 404 U.S. 872; see also *Gray v. Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001; *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953).[5]

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[5] Judge Learned Hand wrote in *Otten*, 205 F.2d at 61:

> The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *inquitous dens*, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal

The court below proceeded as if Title VII is as a matter of course to be given priority over the NLRA. That approach is inconsistent with this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). There the Court held that Title VII's requirement of reasonable accommodation of religious beliefs and practices is not to be construed to undercut decisions made by Congress that "lie[] at the core of our national labor policy" without a "clear and express indication from Congress" that it so intended. *Id.* at 79.

There is no evidence in the legislative deliberations over Title VII—either in 1964, when the ban on religious discrimination was enacted, or in 1972, when § 701(j) was added to codify the EEOC's requirement of "reasonable accommodation"—that Congress intended to overturn the decisions respecting union security made in 1947. The exemption of religious objectors from union dues was never mentioned in the 1964 debates, and the EEOC, although construing the 1964 Act's ban on religious discrimination to require "reasonable accommodation" in other respects, did not understand that requirement to entail exemption of religious objectors from the scope of union security agreements:

> The Commission was . . . required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The Commission held that ". . . a union shop is not unlawful" and that Charging Party's refusal on religious grounds is protected by neither Title VII nor the First Amendment. [Sixth Annual Report, Equal Employment Opportunity Commission, p. 12 (March 30, 1972)].

Section 701(j) was added to Title VII in 1972 "to resolve by legislation" doubts as to the correctness of the

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life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

EEOC's understanding that the 1964 Act required "reasonable accommodation" (*Hardison*, 432 U.S. at 73-74). The concern that prompted its enactment—and indeed the only concern specifically discussed during the brief debate—was the plight of Sabbatarians whose ability to obtain and hold jobs was hampered by employer requirements of Saturday work. 118 Cong. Rec. 705-706 (1972). The "reasonable accommodation" its sponsor sought to achieve was that "employers on some occasions . . . adjust work schedules to fit the requirements of the faith of some of their workers." *Id.* The legislative history of § 701(j), which spans less than two pages of the Congressional Record, *id.*, contains no reference whatever to the subject of union dues. That Congress did not have union security agreements in mind when it enacted § 701(j) is particularly evident from the language of that provision, which speaks only of an "employer" duty to "reasonably accommodate".[6]

In contrast to the total absence of congressional consideration of union security in the context of Title VII, contemporaneous with the enactment of Title VII in 1964 and with its amendment in 1972 proposals to create an exemption from union security for religious objectors were introduced in the form of proposed amendments to the NLRA. Religious objectors (and particularly the Seventh Day Adventist ("SDA") Church) repeatedly urged Congress to amend the NLRA to provide them an

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[6] The courts of appeals that have construed § 701(j) to reach union security agreements have acknowledged the incongruity between their rulings and the language of § 701(j), albeit remaining unwilling to draw the inference that Congress did not intend to reach union security agreements. See, *e.g.*, *Cooper*, *supra*, 533 F.2d at 170-171 (Gee, J.), 172-173 (Brown, C.J.), 175 (Rives, J.); *McDaniel*, *supra*, 571 F.2d at 344; *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928; *and see* the decision below (App. 3a).

exemption from union security agreements.[7] Between 1965 and 1973, 8 bills were introduced seeking to amend § 8(a)(3) to create a dues exemption for religious objectors who offer to make equivalent payments to charities; none was enacted.[8]

The contemporaneous understanding of Congress that Title VII did not overturn the decisions respecting union security made in the 1947 amendments to the NLRA is dramatically evidenced by legislative events surrounding proposed amendments to the NLRA immediately following enactment of § 701(j). In 1973 a bill was introduced in the Senate to expand the NLRA's definition of "employer" to embrace nonprofit hospitals, which until then had not been covered by the NLRA. That bill was of paramount interest to the SDA Church, which operated 49 hospitals and nursing homes in the United States.

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[7] There are at least seven religions whose tenets include conscientious objection to financial support of labor unions. SDA (which has approximately 500,000 members) is the largest. Others are the Amish, Mennonites, National Association of Evangelicals, Christian Missionary Alliance, Old German Baptist, and Plymouth Brethren IV. 123 Cong. Rec. 36275 (1977).

[8] *Prior to the enactment of § 701(j) in 1972.* Three bills were introduced in 1965 (89th Cong., 1st Sess.): H.R. 8962, 111 Cong. Rec. 13295, 18631; H.R. 9619, 111 Cong. Rec. 15558; H.R. 11666, 111 Cong. Rec. 27482. Two bills were introduced in 1966 (89th Cong., 2d Sess.): S. 3203, 112 Cong. Rec. 7844, 7847-48; S. 3153, 112 Cong. Rec. 6876, 6879. One bill was introduced in 1967 (90th Cong., 1st Sess.): H.R. 7683, 113 Cong. Rec. 7764. One bill was introduced in 1970 (91st Cong., 2nd Sess.): S. 4008, 116 Cong. Rec. 20928.

Subsequent to enactment of § 701(j) in 1972. One bill was introduced in 1973 (93rd Cong., 1st Sess.); S. 2109, 119 Cong. Rec. 22208.

In 1974 Congress did create a *partial* exemption, applicable only to the health care industry, by enacting § 19 of the NLRA. See pp. 14-16, *infra*. And in December, 1980, Congress amended § 19 to provide a form of exemption in all industries. See pp. 16-17, *infra*.

Leg. Hist. at 285.[9] Spokesmen for the Church testified at hearings on the bill in 1973 that existing law provided no exemption for religious dues objectors, and urged *inter alia* an amendment providing "some kind of exemption" from dues obligations under union shop agreements for employees with religious objections to such payments. *Id.* at 120-121, 132.

The Committee reported out the bill to extend NLRA coverage to the health care industry without any dues exemption. In the course of the Senate debate, Senator Dominick proposed an amendment that would have provided a religious dues exemption not merely for employees in that industry, but for all employees covered by the NLRA, so long as an equivalent amount were contributed to charity. *Id.* at 193. He observed that "as we all know" there was no such exemption under existing law, *ibid.* He reminded his colleagues that "a few years ago" the SDA Church had urged Congress to provide such an exemption, but that the sought-after exemption had not been enacted. *Id.* at 193-194. Senator Dominick explained that, in consequence, under existing law members of the SDA Church were required to forego employment in bargaining units covered by union shop agreements in order to remain faithful to their religious beliefs, and he urged that "there ought to be something in the law which makes this type of employment available for people who hold these religious beliefs. . . ." *Id.* at 196.

Senator Dominick's proposal met with vigorous opposition. Senator Javits agreed that existing law required SDA members to "pay their part of the cost," *id.* at 200, and he dismissed Senator Dominick's proposed substitute (that religious objectors pay an equal amount to charity)

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[9] Throughout this petition, we will use the term "Leg. Hist." to refer to *Legislative History of the Coverage of Non-profit Hospitals under the NLRA, 1974*, published by the Senate Committee on Labor and Public Welfare, 93rd Cong., 2nd Sess. (Committee Print 1974).

as not "mean[ing] anything to the union in question which has to bear the cost. The union has an interest in avoiding 'free riders'." *Ibid.* See also *id.* at 203-204 (Sen. Taft). The Dominick amendment was tabled, *id.* at 212, and the bill to extend NLRA coverage to non-profit hospitals was passed by the Senate without any provision for exemption of religious dues objectors, *id.* at 258-260.

The bill was then sent to the House, and was reported out by the House Committee with no dues exemption provision. Four congressmen appended "additional views" to the House report urging that the bill be amended to provide a dues exemption for religious objectors employed by non-profit hospitals, there being no such exemption under existing law, *id.* at 285. When the bill reached the House floor, Representative Erlenborn proposed such an amendment, explaining that existing law contained no exemption, *id.* at 298. In the ensuing debate, proponents and opponents agreed that no such exemption then existed. *Id.* at 299, 333 (Rep. Thompson); 299 (Rep. Erlenborn); 334-335 (Rep. Green).

The Erlenborn amendment was approved by the House, *id.* at 335; the House bill was passed with an exemption for religious objectors employed in the health care industry, *id.* at 338; the Senate and House bills went to a conference at which the Senate acceded to the exemption, *id.* at 348; and both the Senate and the House approved the conference report, *id.* at 384, 408. The conferees in both houses characterized the bill as creating an "exemption" for employees in the health care industry from the requirement in all other industries that religious objectors pay dues under union shop agreements. *Id.* at 361 (Sen. Williams); 374 (Sen. Taft); 386 (Rep. Thompson).

Six years later, in December 1980, Congress amended § 19 of the NLRA to provide a form of dues exemp-

tion to all employees covered by the NLRA[10] but one that *differs* substantially from the lower courts' construction of Title VII[11] and commits enforcement to the NLRB.[12] The lasting consequence of the error below is

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[10] Section 19 of the NLRA, as amended in December, 1980, is codified as 29 U.S.C. § 169, and is quoted in the opinion of the court below, App. 4a-5a, n.2.

[11] The court below stated that the 1980 NLRA amendment mandates "an accommodation virtually identical" to that ordered below. App. 4a. That is not correct. Section 19 of the NLRA contains no "undue hardship" exception as appears in § 701(j) of Title VII. On the other hand, § 19 authorizes unions to charge religious dues objectors for the reasonable cost of their using the grievance-arbitration procedure, whereas the injunction approved in this case, issued under Title VII, does not permit such a charge. App. 22a. Section 19 extends dues exemption only to an employee who is a member of a "bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations"; by contrast, the EEOC's Religious Discrimination Guidelines, 29 C.F.R. § 1605.1, provide:

> [T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . . The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. [Footnote omitted].

Thus, while Congress carefully shaped section 19 of the NLRA to assure that strongly-held secular views such as reflected in *Buckley v. American Fed. of Television & Radio Artists*, 496 F.2d 305 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1093 and *International Union v. National Right To Work Foundation*, 590 F.2d 1139, 1143 (D.C. Cir. 1978) need *not* be accommodated, the EEOC has construed Title VII to open the door to just such claims of right to exemption for secular views.

[12] Section 19 of the NLRA qualifies the proviso to § 8(a)(3) of the NLRA, and thus makes it an unfair labor practice (violative of §§ 8(a)(3) and 8(b)(2)) for an employer to discriminate against an employee protected by § 19 for refusing to pay dues or for a union to cause or attempt to cause an employer to do so.

not to provide relief to religious objectors, but to confound the solution Congress mandated in § 19 of the NLRA.

The lesson of *Teamsters v. Daniel*, 439 U.S. 551, 569-570 is very much in point:

> If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1964, 88 Stat., 829, would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. * * *
>
> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to non-contributory, compulsory pension plans. * * * Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose * * * Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.

This Court therefore should assume the "responsibility to reconcile [separate congressional enactments] where feasible." *U.S. v. National Assn. Securities Dealers*, 422 U.S. 694, 720. Certiorari should be granted so that this Court can remove Title VII and the EEOC from an area into which the lower courts, without congressional authorization, have thrust them.

II. The Meaning Of Undue Hardship

Title VII's requirement of "reasonable accommodation" for religious beliefs and practices is subject to an express limitation: such accommodation is not required where "undue hardship" would result to those providing the accommodation (§)701(j)). The courts of ap-

peals construing Title VII to require accommodation of religious objections to dues payments all have rejected the unions' pleas that such accommodation would result in "undue hardship." [13] The consistent rationale has been that the unions have not shown that they will be *hurt*, i.e. unable to perform their functions, in the absence of the objectors' dues. As articulated by the court below, accommodating dues objectors is an undue hardship only where the dues in question are "necessary for [the union's] maintenance or operation." App. 8a. That standard was taken to its furthest reach in this case, in which a local union has been found to suffer no undue hardship although deprived of $1,200 each year —3% to 5% of its total annual receipts—and deprived as well of the opportunity to build a small reserve against future contingencies.

That definition of "undue hardship" is unfaithful to the construction of § 701(j) by this Court in *TWA v. Hardison, supra.* The plaintiff in *Hardison*, a Sabbatarian whose unwillingness to work on Saturdays had led to his discharge, contended that TWA could reasonably have accommodated his religion by "replac[ing] Hardison either with supervisory personnel or with qualified personnel from other departments" or by "replac[ing] Hardison on his Saturday shift with other available employees through the payment of premium wages," *id.* at 84. This Court rejected these proposals, explaining:

> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. [*Id.* at 84; footnote omitted].

The dissent, while conceding that "important constitutional questions would be posed by interpreting the law

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[13] See cases cited *supra*, p. 9, n.4. See also *Anderson v. General Dynamics*, 589 F.2d 397, 401-402 (9th Cir. 1978), *cert. denied*, 433 U.S. 908; *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072.

to compel employers (and fellow employees) to incur substantial costs to aid the religious observer," *id.* at 90 (Marshall, J.), protested that in *Hardison* "the price [of accommodation] is far from staggering: $150 for three months," *id.* at 92, n. 6. That protest was unavailing.

The holding in *Hardison* was not dependent upon a determination that incurring the cost entailed would threaten TWA's capacity to survive or operate; while the dissent would have construed the statute to require such an individualized assessment ("[t]o conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense," *id.* at 91), the majority construed the statute to provide a uniform standard: is the cost "more than . . . *de minimis*," *id.* at 84. The construction of § 701(j) by the court below thus is consistent with that of the *dissent* in *Hardison*, but not with that announced by the majority of this Court.

III. The Applicable Constitutional Principle

Section 701(j) as construed by the lower courts requires all the other employees in the bargaining unit to subsidize the provision of union representation to Seventh Day Adventists and other religious objectors. Religious objectors, solely because of their religion, are accorded a benefit denied to all others, no matter how strong the latter's *secular* objections to paying union dues;[14] and those others must finance the services which the union is required to furnish to the religious objectors. As thus construed, § 701(j) poses serious Establishment Clause questions—indeed, it is unlike any governmental regulation heretofore upheld by this Court under that Clause.

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[14] That there are persons with strong *secular* objections to paying union dues is evidenced by such cases as *Buckley*, *supra*, and *National Right To Work Foundation*, *supra*, n.11.

This Court's decisions to date have been consistent that a law that, on the basis of religion, "single[s] out a class of . . . citizens for a special economic benefit" has a legislative effect the Establishment Clause was designed to forbid. *Sloan v. Lemon*, 413 U.S. 825, 832. As this Court has explained, the Establishment Clause was a reaction to the English practice, carried over into some of the Colonies, of governmental "taxing", or "tithing", of citizens to support religious activities. *Everson v. Board of Education*, 330 U.S. 1, 9-14. Imbued with "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions," *id.* at 11, advocates of the First Amendment achieved an Establishment Clause that "means at least this":

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, which aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities. . . . [*Id.* at 15-16.][15]

Based upon these considerations, this Court, without exception, has struck down every statute conferring an economic benefit exclusively, or even primarily, upon members of particular religious sects, or upon members of all religions to the exclusion of non-religionists. See, e.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756, 775, 781-782, 782-783 n. 38, 788-789, 793-794; *Sloan, supra*, 413 U.S. at 830, 832; *Meek v. Pittinger*, 421 U.S. 349, 363-364.[16]

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[15] See also, *Abingdon School Dist. v. Schempp*, 374 U.S. 203, 225, quoting Madison, Memorial and Remonstrance Against Religious Assesments, II Writings of Madison 183, 185-186.

[16] Cases in which financial aid has been upheld all have been justified by the principle that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 746. See, e.g., *Everson, supra*, 330 U.S. at 17; *Board of Education v.*

The court below, and the other lower courts applying Title VII to union security clauses (see notes 4 and 13 *supra*), have understood the Establishment Clause challenge to be defeated by this Court's decision in *Gillette v. United States*, 401 U.S. 437, upholding the exemption of conscientious objectors from military conscription.[17] But *Gillette* did not involve, and did not purport to deal with, the Establishment Clause's core prohibition of coerced subsidization. How to harmonize *Gillette* with the line of cases prohibiting the conferral of "special economic benefits" on the basis of religion is a delicate constitutional question this Court has not yet addressed. Indeed the Court has recognized that § 701(j), unless narrowly construed, could pose serious Establishment Clause questions. *TWA v. Hardison*, *supra*, 432 U.S. at 69-70 n. 4; *id.* at 89-90 and n. 3 (Marshall, J., dissenting). Given the frequency with which the issue has arisen in the lower courts in the union security context (see notes 4 and 13, *supra*), this is an appropriate case in which to undertake that important task.

Allen, 293 U.S. 236, 243; *Walz v. Tax Commission of The City of New York*, 397 U.S. 664, 671-673, 676; *id.* at 689 (Brennan, J., concurring); *id.* at 696 (Harlan, J., concurring); *Wolman v. Walter*, 433 U.S. 229, 242.

[17] The court below relied upon four decisions in addition to *Gillette* (App. 9a-10a, 12a-13a), but that reliance was misplaced. In two, this Court found no Establishment Clause violation because the challenged statutes treated religious institutions the same as secular institutions. *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617; *Walz v. Tax Commission*, *supra* n.16. In the other two, the Court found accommodation required by the Free Exercise Clause, *Wisconsin v. Yoder*, 406 U.S. 205; *Sherbert v. Verner*, 374 U.S. 398; (to like effect see *Thomas v. Review Bd. Ind. Empl. Sec. Div.*, —— U.S. ——, 67 L.Ed.2d 624 (1981)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-3029

HERMAN O. TOOLEY, EDWARD J. HELT and ARNOLD G. BAKKE,
Plaintiffs-Appellees,

v.

MARTIN-MARIETTA CORPORATION; and UNITED STEEL WORKERS OF AMERICA, LOCAL 8141,
Defendants-Appellants.

Argued and Submitted Jan. 15, 1981

Decided June 22, 1981

Before HUG, TANG and FARRIS, Circuit Judges.

FARRIS, Circuit Judge:

The United Steelworkers of America, Local 8141, appeal the decision and order of the district court, enjoining the Steelworkers and the Martin-Marietta Corporation from attempting to discharge the plaintiffs for their nonpayment of union dues. We affirm.

FACTS

In 1976, the Martin-Marietta Corporation and Steelworkers Local 8141 executed a collective bargaining agreement containing a "union shop" clause, under which the company was obligated to discharge all employees who failed to join the union. Plaintiffs Tooley, Bakke, and Helt are Seventh Day Adventists who, under the tenets of their faith, are prohibited from becoming members in or paying a service fee to a union. Plaintiffs informed

the company and the union of this proscription, and offered to pay an amount equal to union dues to a mutually acceptable charity. The union refused.

After exhausting their administrative remedies, plaintiffs instituted this action, alleging that the union's and the company's refusal to honor the requested accommodation constituted religious discrimination under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e—2(a), 2000e—2(c) (1976). In particular, the plaintiffs argued that both the union and the company were required under section 701(j) of the Act, 42 U.S.C. 2000e(j) (1976), to make good faith efforts to institute their requested exemption unless it would result in undue hardship to either the Steelworkers or the company. The Steelworkers contended that the "substituted charity" accommodation was unreasonable, that its implementation would cause the union undue hardship, and that by authorizing such an accommodation, section 701(j) violated the Establishment Clause. The district court enjoined the union and the company from attempting to discharge the plaintiffs for failing to pay union dues so long as they make equivalent contributions to a mutually acceptable charity. *Tooley v. Martin-Marietta Corp.*, 476 F.Supp. 1027 (D.Or.1979).[1]

DISCUSSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2(a) and 2000e—2(c) (1976), provides that it is an unlawful employment practice for either an employer or a union to discriminate against an individual because of that individual's "religion." Section 701(j) of the Act, 42 U.S.C. 2000e(j) (1976), defines "religion" to include all aspects of religious observance, "unless an

[1] The parties have agreed to maintain an amount equal to the dues owed by the plaintiffs to the union in a deposit account pending the disposition of this case.

employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." Although this definition is framed in terms of the employer's ability to accommodate, we have held that the duty imposed by section 701(j) applies equally to unions. *Yott v. North American Rockwell Corp. (Yott II)*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1316, 63 L.Ed.2d 761 (1980).

We have previously considered, in four separate opinions, the applicability of Title VII's religious discrimination provisions to fact situations involving religious objectors to mandatory union dues. *Yott II*; *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); *Yott v. North American Rockwell Corp. (Yott I)*, 501 F.2d 398 (9th Cir. 1974). In each case, we supplied guidelines for determining the scope of both the "reasonable" accommodation requirement and the "undue" hardship limitation imposed by section 701(j) in factual settings nearly identical to that presented here.

I. REASONABLENESS OF THE SUBSTITUTED CHARITY ACCOMMODATIONS

The Steelworkers do not deny that the plaintiffs established a prima facie case of discrimination under Title VII. The burden was thereafter on the Steelworkers to establish that they reasonably accommodated the plaintiffs' religious beliefs. *Anderson*, 589 F.2d at 401. The Steelworkers argue, however, that they were not required to make any effort to accommodate the plaintiffs' religious

beliefs because the requested accommodation was inherently "unreasonable."

The Steelworkers first contend that the substituted charity accommodation is unreasonable because it is plainly inconsistent with the broad and unqualified national labor policy of promoting union shop agreements between union and employer. *See* 29 U.S.C. § 158(a)(3) (1976). We have previously acknowledged the apparent "tension and conflict" between the union's interest in obtaining the benefits of a union shop agreement, authorized by the NLRA, and the interests of religious employees in avoiding the burdens and evils associated with employment discrimination, prohibited by Title VII. *Anderson*, 589 F.2d at 400. We observed, however, that section 701(j) effects a balance between these interests by requiring *reasonable* accommodation of the employees' religious beliefs by the union or the employer in the absence of resulting *undue* hardship to either. *Id.* at 400-01; *accord, McDaniel v. Essex International, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978); *Cooper v. General Dynamics, Convair Aerospace Division*, 533 F.2d 163, 169-70 (5th Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977). The substituted charity accommodation is consistent with the balancing of interests promoted by section 701(j). Under this accommodation, the union is entitled to enjoy the benefits of the union shop agreement while the plaintiffs are entitled to practice in accordance with their religious convictions. To the extent that the substituted charity accommodation effects this balance, it is reasonable under section 701(j).

Our conclusion is consistent with recent additions to the NLRA Congress has amended section 19 of the NLRA to require an accommodation virtually identical to that requested by the plaintiffs.[2] *See* Act of Dec. 24, 1980, Pub.L.

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[2] Section 19 of the NLRA now provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion,

No. 96-593, 94 Stat. 3452. The legislative history to that amendment (1) recognizes that the substituted charity accommodation effects a reasonable reconciliation between section 8(a)(3) of the NLRA and Title VII, and otherwise constitutes a reasonable accommodation under section 701(j)[3] and (2) establishes that the accommodation does not interfere with the employer's or union's right to execute union shop agreements, which are still authorized under section 8(a)(3).[4]

Alternatively, the Steelworkers argue that exempting the plaintiffs from mandatory union dues is unreasonable because it results in impermissible unequal treatment. Disparate treatment of employees, however, is not necessarily unreasonable. *See Brown v. General Motors Corp.*, 601 F.2d 956, 961-62 (8th Cir. 1979). The religious accommo-

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body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

[3] 126 Cong. Rec. H760 (daily ed. Feb. 11, 1980) (remarks of Rep. Thompson); 126 Cong. Rec. H763 (daily ed. Feb. 11, 1980) (remarks of Rep. Duncan).

[4] 126 Cong. Rec. H764 (daily ed. Feb. 11, 1980) (remarks of Rep. Erlenborn).

dation provisions do not authorize *preferential* treatment of employees. They do not require an employer or union to deny the express contractual rights of some employees or to incur substantial costs of accommodations for the benefit of those to be accommodated. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81, 84, 97 S.Ct. 2264, 2275, 2276, 53 L.Ed.2d 113 (1977). The substituted charity accommodation does not result in preferential treatment between employees. The plaintiffs suffer the same economic loss as the union member employees. The accommodation is reasonable.[5]

II. HARDSHIP FROM THE SUBSTITUTED CHARITY ACCOMMODATION

The Steelworkers argue that the substituted charity accommodation works an undue hardship on the union by depriving it of funds necessary for the union's support. The district court noted that the Steelworkers' surplus reserves for the last three years, even after charitable contributions, exceeded the dues lost by accommodating as many as six employees.[6] Consequently, the district court held that since the "likelihood" of hardship to the union would be "remote," the Steelworkers had failed to establish "undue" hardship. 476 F.Supp. at 1030-31.

The Steelworkers first contend that the standard used by the district court is inconsistent with that adopted by the *Hardison* Court, which held that "accommodation costs" that are greater than *de minimis* place an undue hardship

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[5] Section 19 of the NLRA, as amended by Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452, constitutes a sufficiently "clear and express indication from Congress" that any alleged unequal treatment between employees resulting from the "substituted charity" accommodation is permissible under Title VII. *Hardison*, 432 U.S. at 79, 85, 97 S.Ct. at 2274, 2277.

[6] In addition to the plaintiffs, three other employees have requested similar accommodation.

on an employer, 432 U.S. at 84, 97 S.Ct. at 2276, and presumably a union. The Steelworkers contend that reference to the availability of surplus funds in the union's reserve is a departure from the *de minimis* standard.

We have recognized that the *Hardison* standard applies to religious accommodations of the kind requested here. *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979). We have acknowledged, however, that the decision of whether a particular accommodation works an undue hardship on either an employer or union must be made by considering "the particular factual context of each case." *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 422 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979). A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of "actual imposition on co-workers or disruption of the work routine." *Id.* at 406-07. The *magnitude* as well as the *fact* of hardship must be determined by the examination of the facts of each case. The approach adopted by the district court is not inconsistent with these principles.[7]

The Steelworkers also contend that, even if the district court applied the correct standard to determine the magnitude of the accommodation cost, its conclusion was clearly erroneous. We disagree. A "widespread refusal to pay union dues" is sufficient to establish undue hardship, *Burns*, 589 F.2d at 407, but that is not the contention here.

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[7] The approach is not inconsistent with that adopted in *Hardison*. In finding that the accommodation cost in *Hardison* was greater than *de minimis*, the Supreme Court considered factors unique to the particular facts of that case by considering the cost to the employer of implementing the accommodation, as well as the likelihood of other employees requesting similar accommodations. 432 U.S.C. at 84 n.15, 97 S.Ct. at 2277 n.15.

The Steelworkers have not established that the "substituted charity" accommodation, as applied here, will deprive the union of monies necessary for its maintenance or operation. The district court's conclusion is not clearly erroneous.

III. THE CONSTITUTIONALITY OF SECTION 701(j) OF TITLE VII

The Steelworkers argue that section 701(j) as applied here violates the Establishment Clause.[8] The district court held that section 701(j) withstood constitutional attack under the three-pronged test enunciated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73, 93 S.Ct. 2955, 2965, 39 L.Ed.2d 948 (1973). *See also Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). We agree. *Accord*, *Nottelson v. A. O. Smith Corp.*, 643 F.2d 445, 453-55 (7th Cir. 1981); *Burns v. Southern Pacific Transportation Co.*, 20 Empl.Prac.Dec. ¶ 30,184, at 11,977-78 (D.Ariz. 1979), *on remand from* 589 F.2d 403 (9th Cir. 1978). *Contra*, *Anderson v. General Dynamics Convair Aerospace Division*, 489 F.Supp. 782, 784-91 (S.D.Cal. 1980), *on remand*

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[8] The plaintiffs contend that the constitutional validity of § 701(j) as applied here has been determined conclusively by the Supreme Court's dismissal of the appeal in *Rankins v. Comm'n on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852, 154 Cal.Rptr. 907, *appeal dismissed*, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979). There, the California state constitutional employment discrimination provision, construed to require the same accommodations as those required by Title VII's § 701(j), was held not to offend the Establishment Clause in requiring a school district to accommodate a teacher who refused to work on religious holidays. The dismissal of the appeal in *Rankins* binds this court only on "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). Because this case and *Rankins* involve entirely different kinds of religious accommodations, the constitutional dimension of each is necessarily different.

from 589 F.2d 397 (9th Cir. 1978); *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (C.D.Cal.1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1316, 63 L.Ed.2d 761 (1980).

The Establishment Clause ensures government neutrality in matters of religion. *Gillette v. United States*, 401 U.S. 437, 449, 91 S.Ct. 828, 835, 28 L.Ed.2d 168 (1971). But government neutrality "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." *Sherbert v. Verner*, 374 U.S. 398, 422, 83 S.Ct. 1790, 1803, 10 L.Ed.2d 965 (1963) (Harlan, J., dissenting). Courts have defined the government's obligation as one of "benevolent neutrality." *Walz v. Tax Commission*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970). While the government must avoid "partiality to any one group," *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952), it may deviate from absolute rigidity to accommodate the religious practices of each group. *Walz*, 397 U.S. at 669, 90 S.Ct. at 1411.

Government can accommodate the beliefs and practices of members of minority religions without contravening the prohibitions of the Establishment Clause. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22, 92 S.Ct. 1526, 1542 n.22, 32 L.Ed.2d 15 (1972) (exempting Amish children from state compulsory education laws); *Sherbert v. Verner*, 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963) (exempting Seventh-Day Adventists from state unemployment compensation requirements). Government may legitimately enforce accommodations of religious beliefs when the accommodation reflects the "obligation of neutrality in the face of religious differences," and does not constitute "sponsorship, financial support, [or] active involvement of the sovereign in religious activities" with which the Establishment Clause is mainly concerned. *Wisconsin v. Yoder*, 406 U.S. at 234 n.22, 92 S.Ct. at 1542

n.22; *Walz v. Tax Commission*, 397 U.S. at 668, 90 S.Ct. at 1411; *Sherbert v. Verner*, 374 U.S. at 409, 83 S.Ct. at 1796.

Like the accommodations allowed in *Sherbert v. Verner* and *Wisconsin v. Yoder*, the substituted charity accommodation satisfies these requirements. By exempting the plaintiffs from union membership or the payment of mandatory union dues, the accommodation places the plaintiffs on an equal footing with other employees whose religious convictions find no impediment in the workplace. To this extent, the accommodation reflects governmental neutrality in the face of religious differences. Further, the substituted charity accommodation does not involve government "sponsorship" or "financial support" of the Seventh-Day Adventist religion: the accommodation requires that the plaintiffs suffer the same economic loss as their co-workers who are not similarly restricted in paying union dues or in obtaining union membership. The accommodation demands neither direct nor indirect financial support of the plaintiffs' religion by the government, and cannot be reasonably construed as actively advancing or assisting their religion.

This same conclusion is compelled under the test enunciated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73, 93 S.Ct. 2955, 2965, 39 L.Ed.2d 948 (1973). The *Nyquist* test, typically applied to state legislation, requires that for section 701(j) to be consistent with the demands of the Establishment Clause, it must (1) reflect a clearly secular purpose, (2) have a primary effect that neither inhibits nor advances religion, and (3) avoid excessive government entanglement with religion.[9]

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[9] The Steelworkers' attack on § 701(j) as applied presents an apparent obstacle to application of the *Nyquist* test, as each element of the test normally requires an examination of the legislation as a whole. Because the "reasonable accommodation" and

1. *Legislative Purpose*

The primary motivation for the enactment of section 701 (j) was to resolve many of the issues left open by prior "Sabbatarian" cases, where employees refused to work on their Sabbath and requested that their employers accommodate them. *Hardison*, 432 U.S. at 73-74, 97 S.Ct. at 2271. The Steelworkers contend that because section 701 (j) was intended to secure special treatment for Sabbatarians and other religious proponents, the legislation has an improper sectarian purpose.

Although section 701(j)'s enactment may have resolved certain problems confronting sectarians, this alone is insufficient to establish that the legislation lacks a clearly secular purpose. *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393 (1961); *Stone v. Graham*, —— U.S. ——, 101 S.Ct. 192, 195, 66 L.Ed.2d 199 (1980) (Rehnquist, J., dissenting). Section 701(j) was intended to promote Title VII's broader policy of prohibiting discrimination in employment. The bill's sponsor in the Senate, recognizing the problems confronting Sabbatarians in particular, stated that the legislation was intended to "assure that freedom from religious discrimination in the employment of workers is for all time guaranteed in law." 118 Cong.Rec. 705. Section 701(j) functions to "secure equal economic opportunity to members of minority religions."[10] *Hardison*, 432 U.S. at 90 n.4, 97 S.Ct. at 2280 n.4 (Marshall, J., dissenting). *Cf. Rankins v. Commission on Professional Competence*, 24 Cal.3d 167,

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"undue hardship" provisions of § 701(j) operate uniquely in each case, the narrow attack on § 701(j) in this case is appropriate. Consequently, to the extent it is possible, we apply the *Nyquist* test to determine the legitmacy of § 701(j) as applied.

[10] The legislative history to § 19 of the NLRA, as amended by Act of Dec. 24, 1980, Pub.L. No. 96-593, 94 Stat. 3452, reflects this same broad ameliorative purpose. *See* 126 Cong.Rec. H763 (daily ed. Feb. 11, 1980) (remarks of Rep. Duncan).

177-78, 593 P.2d 852, 859, 154 Cal.Rptr. 907, 913-14 (recognizing as secular the purpose of "promot[ing] equal employment opportunities for members of all religious faiths"), *appeal dismissed*, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979). It therefore has a legitimate secular purpose.

2. *Primary Effect*

The Steelworkers contend that the substituted charity accommodation has the primary effect of advancing the plaintiffs' religion by conferring various alleged economic benefits. It is argued that as a consequence of the accommodation, the plaintiffs have a greater choice than their co-workers in determining how their money is spent, and are more easily able to make charitable contributions.

We reject this argument. It confuses ancillary or incidental benefits with primary benefits to those accommodated. It could be argued, for example, that the exemption allowed the Amish children in *Wisconsin v. Yoder* permitted the children to contribute additional economic benefit to their families, and that the exemption allowed in *Sherbert v. Verner* permitted the Seventh-Day Adventist to exercise a greater choice in determining which day of the week was to be free of employment responsibilities.

The substituted charity accommodation allows the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their co-workers without similar beliefs. It neither increases nor decreases the advantages of membership in the Seventh-Day Adventist faith in a manner so substantial and direct that it "advances" or "inhibits" the plaintiffs' religion.

The Steelworkers also contend that the accommodation violates the Establishment Clause because it will ultimately result in either the union curtailing necessary services, or forcing the accommodation cost on other employees. In either case, the Steelworkers argue that the plaintiffs re-

ceive the benefit of their religious beliefs at the expense of their co-workers. As a result, it is urged that the accommodation impermissibly places the burdens of accommodation on unaccommodated private parties.

A religious accommodation does not violate the Establishment Clause merely because it can be construed in some abstract way as placing an inappreciable but inevitable burden on those not accommodated. Exemption of conscientious objectors from military conscription has been upheld despite the effect of requiring nonobjectors to serve in their stead. *Gillette v. United States*, 401 U.S. 437, 452 n.17, 91 S.Ct. 828, 838 n.17, 28 L.Ed.2d 168 (1971); *Selective Draft Law Cases*, 245 U.S. 366, 389-90, 38 S.Ct. 159, 165, 62 L.Ed. 349 (1918). Sectarian institutions are exempt from the payment of property taxes, even though the effect may be to increase marginally the property tax paid by unaccommodated private citizens. *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). Sunday closing laws have been upheld even though their effect may be to burden those who sincerely observe another Sabbath. *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961); *Hardison*, 432 U.S. at 96 n.13, 97 S.Ct. at 2283 n.13 (Marshall, J., dissenting).

The substituted charity does not have a primary effect which either advances or inhibits the plaintiffs' religion.

3. *Government Entanglement*

Nor do we find that the accommodation here requires that the government become impermissibly entangled with the accommodation's administration. The Establishment Clause prohibits only excessive government entanglement. *Walz v. Tax Commission*, 397 U.S. 664, 674-75, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970). The implementation of the substituted charity accommodation requires a mini-

mal amount of supervision and administrative cost. Once the sincerity of a religious objector's belief is established, the only administrative burden involves the employee and the union agreeing on a mutually acceptable charity. The Steelworkers have not demonstrated that the burden of administering this accommodation involves sufficiently significant amounts of time or money or that the government involvement is sufficiently "comprehensive, discriminating, and continuing" to draw into question the validity of the accommodation. *Lemon v. Kurtzman*, 403 U.S. 602, 619 91 S.Ct. 2105, 2114, 29 L.Ed.2d 745 (1971).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civ. No. 76-933

HERMAN O. TOOLEY, EDWARD J. HELT and ARNOLD G. BAKKE,
Plaintiffs,

v.

MARTIN-MARIETTA CORPORATION, a corporation, UNITED STEELWORKERS OF AMERICA, LOCAL 8141, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants.

Sept. 27, 1979

SOLOMON, District Judge:

Herman Tooley, Arnold Bakke and Edward Helt filed this Title VII action for relief from religious discrimination by their employer, the Martin-Marietta Corporation (company); their local union, United Steelworkers of America, Local 8141 (union); and their national union, United Steelworkers of America, AFL-CIO (national union).

In October 1976 the company and the union entered into a collective bargaining agreement which includes a closed shop provision. Plaintiffs were then subject to discharge if they failed to join the union. All three plaintiffs are Seventh Day Adventists and refuse to join a union, or pay a service fee equal to union dues, because of their sincere religious beliefs.

Plaintiffs informed the company and the union that they could not, in good conscience, support the union.

Plaintiffs offered to pay an amount equal to their union dues to a mutually acceptable charity but the union refused to accept this accommodation.

Plaintiffs exhausted their administrative remedies with respect to their local union and the company, received right to sue letters from the Equal Employment Opportunities Comimssion, and brought this action. The parties agreed that the union would not ask the company to fire plaintiffs during this action and plaintiffs now pay an amount equal to their union dues into a savings account. Plaintiffs seek injunctive relief against both the union and the company and also attorney's fees from the union.

Plaintiffs have not alleged the exhaustion of administrative remedies with respect to the national union or otherwise alleged the jurisdictional prerequisites for an action against it. Plaintiffs' action against the national union is therefore dismissed.

Title VII of the Civil Rights Act of 1964, as amended, prohibits religious discrimination by employers, 42 U.S.C. § 2000e-2(a), and unions, 42 U.S.C. § 2000e-2(c). Its definition of religion, Section 2000e(j), provides that practices motivated by religion are protected "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship."

The union contends that Title VII does not prohibit a closed shop authorized by Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3).[1] I disagree. Title VII, which was enacted after the closed shop provisions of the NLRA, prohibits religious discrimination regardless of any otherwise lawful object of the discriminatory practice. *Anderson v. Gen-*

[1] The NLRA, 49 Stat. 449, 452 (1935), was amended by the Labor Management Relations Act, 61 Stat. 136, 140-141 (1947).

eral Dynamics Convair Aerospace Division, 589 F.2d 397, 400-401 (9th Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979).

The union contends that, if Title VII requires a reasonable accommodation despite a closed shop provision, Title VII unconstitutionally establishes accommodated religions in violation of the First Amendment.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

I believe that the religious accommodation provision in Title VII is consistent with the First Amendment.

Some accommodation of religious beliefs and actions is required by the Free Exercise Clause, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.E.2d 15 (1972) (Amish parent may not be prosecuted for refusing to send child to ninth grade); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (Sabbatarian may not be denied unemployment compensation because she is not available for work on Saturdays). The government may accommodate other religious practices without violating the Establishment Clause, *e.g.*, *Gillette v. United States*, 401 U.S. 437, 91 St.Ct. 828, 28 L.Ed.2d 168 (1971) (Conscientious objection to military service); *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (Property tax exemption for religious institutions); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (Sunday closing laws); *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (Release of public school students for religious instruction).

The NLRA authorizes unions to negotiate and enforce closed shop provisions. 29 U.S.C. § 158(a)(3), (b)(2). I believe the religious accommodation provision of Title VII is an appropriate exception to the NLRA. It ac-

commodates the free exercise of religion without violating the Establishment Clause.

Plaintiffs' proposed accommodation will not benefit them or their religion because they intend to make contributions to neutral charities equal to union dues.

The company and the union are protected from an accommodation which would result in an undue hardship.

Title VII is a neutral provision which entitles every employee, believer or atheist, to a reasonable accommodation of his religious beliefs and practices. *See Young v. Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975) (An atheist may not be fired for refusing to attend staff meetings which include a religious talk and a prayer).

The union's reliance on *Gavin v. Peoples Natural Gas Co.*, 464 F.Supp. 622 (W.D. Pa. 1979), is misplaced. *Gavin* holds that an employer is not required to respect an employee's objection to raising the flag at the employer's premises. *Gavin* turned on the basis for the employee's objection to his duty. Here, however, the parties agree that the objection to union membership is based on a sincere religious belief.

The union also contends that the religious accommodation provision is inconsistent with the establishment test used in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). There the issue was does government support for sectarian schools violate the Establishment Clause. *Nyquist* provides that:

> ". . . to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and third, must avoid excessive gov-

ernment entanglement with religion." 413 U.S. at 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948.

If this test governs these facts, the test is satisfied. It is a neutral provision with a satisfactory purpose—to prevent discrimination resulting from the unreasonable refusal to accommodate religious beliefs and practices. A reasonable accommodation will not favor plaintiffs or their religion because plaintiffs agree to contribute to charity an amount equal to union dues. A reasonable accommodation will not result in government entanglement with religion greater than that approved in *Yoder*, *Gillette*, *Walz*, and *Sherbert*.

In my view, the religious accommodation provision promotes the free exercise of religion without violating the Establishment Clause.

The union admits that plaintiffs refuse to support it because of their sincere religious beliefs. This establishes a prima facie case of employment discrimination. The union must therefore prove that it made a good faith effort to accommodate plaintiffs' beliefs and that to accommodate plaintiffs' beliefs would involve an undue hardship. *Anderson*, supra, 589 F.2d at 401.

The union did not make a good faith effort to reasonably accommodate plaintiffs' religious beliefs. It merely insisted that plaintiffs pay the union the equivalent of union dues. This is not a good faith effort. *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 406 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979).

The union argues that it cannot reasonably accommodate plaintiffs' beliefs without bearing an unreasonable hardship. It argues that plaintiffs' dues, and the dues of others likely to agree with plaintiffs, are necessary to support its activities.

This is a frivolous argument. There are approximately 540 employees covered by the collective bargaining agreement. Union dues for the three plaintiffs are less than $600 each year. Even if the union is correct that there are three others who may refuse to support it, the total dues of six employees probably would be less than $1200. The union admits that its 1978 income was about $46,000, $4,300 more than its expenses. The union has had sizable budget surpluses every year since 1976 even though it made substantial contributions to charity in each of those years. The likelihood that the union will ever be burdened by the few members who refuse to pay union dues because of religious beliefs is remote.

The union also contends that the administrative inconvenience of supervising payments to charity is an undue hardship. This too is a frivolous contention. The union is now making larger contributions to charity, and this precise contention was rejected by *Burns*, supra, 589 F.2d at 407.

The union's final contention, that it needs this support to be prepared for litigation, is patently frivolous.

In any event, this case is controlled by *Burns*, which also involved a Seventh Day Adventist who refused to pay $228 each year to a union. He was one of three Seventh Day Adventists in a workforce of 300. The Ninth Circuit Court of Appeals held that the defendants had not proved that equivalent payments to charity would result in an undue hardship to the union in these circumstances and reversed the District Court.

Plaintiffs are entitled to an injunction against the union and the company. The injunction shall prohibit the union from seeking plaintiffs' discharge for failing to support the union as long as plaintiffs make contributions to charity equal to union dues. The company is prohibited from discharging these plaintiffs for their re-

fusal to pay union dues as long as they make equivalent contributions to charity. Within 10 days, the parties shall agree on mutually acceptable charities to which plaintiffs may make contributions or the parties may submit a list of charities so that I may make this determination.

Plaintiffs are entitled to attorney's fees from the union. If the parties cannot agree on the amount of such fees I shall hold a hearing on that issue.

This opinion shall constitute findings of fact and conclusions of law under Fed.R.Civ.P. 52(a).

* * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 76-933

HERMAN O. TOOLEY, EDWARD J. HELT
and ARNOLD G. BAKKE,
Plaintiffs,

vs.

MARTIN-MARIETTA CORPORATION, a corporation; and
UNITED STEEL WORKERS OF AMERICA, LOCAL 8141,
Defendants.

[Filed Dec. 19, 1979]

JUDGMENT

Based on the findings of fact and conclusions of law contained in the opinion dated September 27, 1979,

IT IS ORDERED and ADJUDGED that:

1. Defendants and each of them are enjoined from discharging plaintiffs or seeking plaintiffs' discharge for failure to support defendant Union as long as plaintiffs make contributions to the American Cancer Society in amounts equal to Union dues and initiation fees;

2. Plaintiffs shall make their contributions to the American Cancer Society on a quarterly basis and shall, on a quarterly basis, provide defendants with evidence of such contributions.

3. Plaintiffs shall have a judgment against defendant United Steel Workers of America, Local 8141 for $5,000.00 for attorney's fees.

Dated this 19th day of December, 1979.

/s/ Gus J. Solomon
Judge

Opposition

1

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-572

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STEELWORKERS OF AMERICA,
LOCAL 8141

Petitioner,

v.

HERMAN O. TOOLEY, EDWARD J. HELT,
ARNOLD G. BAKKE, and EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

RESPONDENTS TOOLEY, HELT AND BAKKE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Are the issues before the court in this case moot in light of the December 24, 1980 amendment to Section 19 of the National Labor Relations Act, 29 U.S.C. §169, Pub. L. No. 96-593, 94 Stat. 3452 (herein "HR 4774").

2. If the issues before the court in this case have not been mooted by HR 4774, the following further questions are presented:

(a) Does Title VII of the Civil Rights Act of 1964, §701(j), permit employees, who on religious grounds object to paying dues to a union pursuant to the union security clause of a collective bargaining agreement, to pay an amount equal to union dues to a nonreligious, nonlabor charity where this accomodation does not result in

undue hardship to the union.

(b) Were the holdings of the courts below - that petitioner will not suffer "undue hardship" within the meaning of §701(j) of Title VII clearly erroneous in light of the undisputed fact that in every year in question the union had accumulated reserves substantially in excess of the dues which it seeks to collect from respondents and other Seventh Day Adventist employees.

3. Whether Title VII and §19 of the NLRA, as amended, which provide an exemption from dues obligations for religious objectors, are invalid under the Establishment Clause of the First Amendment?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

NO. 81-572

UNITED STEELWORKERS OF AMERICA,
LOCAL 8141,
Petitioner,

v.

HERMAN O. TOOLEY, EDWARD J. HELT,
ARNOLD G. BAKKE, and EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS TOOLEY, HELT AND BAKKE'S BRIEF IN OPPOSITION

The respondents, Herman O. Tooley, Edward J. Helt and Arnold G. Bakke, respectfully request that this court deny the Petition for Writ of

Certiorari, seeking review of the Ninth Circuit Opinion in this case. That Opinion is reported at 648 F2d 1239.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 19 of the National Labor Relations Act, 29 USC §169, as amended on December 24, 1981, provides:

> "Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organizations as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization, charitable fund exempt from taxation under §501(c)(3)

> of title 26 of the Internal Revenue Code, chosen by such employe from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, into any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests a labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of such procedure."

STATEMENT OF THE CASE

Introduction

Plaintiffs Tooley, Bakke and Helt (respondents here) are Seventh Day Adventists who under the tenets of their faith are prohibited from becoming members of or paying a service fee to a labor union. Respondents claim that Title VII of the Civil Rights Act of 1964 permits them to pay an amount equivalent to union dues to a nonlabor,

nonreligious charity since this accomodation will not result in undue hardship to the union (petitioner here), within the meaning of Title VII.

FACTS

In October 1976, Martin Marietta Corporation (the company) and the United Steelworkers of America, Local 8141 (the union), entered into an agreement containing a union security clause requiring all of its 350 employees[1] to join the union within 30 days. Respondents, who had each worked for the company for approximately 17 years were long standing members of the Seventh Day Adventist Church. They each informed the company and the union that under the tenets of their faith, they were prohibited

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1_/The company's employees numbered 540 at the time of trial.

from becoming members of or paying service fees to the union. Neither the company nor the union questioned the sincerety of respondents' religious beliefs.

Respondents offered to pay an amount equivalent to union dues and initiation fees to a mutually acceptable nonreligious charity. The union refused, and respondents instituted this action alleging that enforcement of the union's security agreement against them would constitute religious discrimination violative of Title VII.

Pending resolution of this action, the parties agreed that respondents and two other Seventh Day Adventists employed at the plant would pay an amount equivalent to dues and initiation fees into a special savings account.

After trial, the savings account was paid over to a mutually agreed-upon charity, the American Cancer Society.

The October 1976 union agreement established monthly union dues in an amount equal to two hours straight time pay. At the time of trial (April 1979), the gross hourly straight time pay of Tooley, Helt and Bakke was $8.02, $7.80 and $7.80, repectively. The amount of union dues was established without regard to respondents' refusal to pay dues to the union. Despite the refusal of respondents and the two other Seventh Day Adventists employees to pay dues or an amount equivalent to dues to the union, the union had receipts in excess of expenditures, including expenditures for charitable contributions, in excess of $10,000.00 for 1976, 1977 and

1978. The union's charitable contributions in 1976, 1977 and 1978 were $2,400.68, $1,872.18 and $2,340.39, respectively.

The union contended that it needed this $10,000.00 excess, plus respondents' due to accumulate a sufficient reserve in anticipation of costs of arbitration of grievances. The union had not been required to arbitrate any grievances since the union agreement became effective in 1976. No evidence was presented that any grievances were pending. No evidence was presented of the anticipated cost to arbitrate grievances or whether these costs would exceed the reserve already accumulated by the union. No evidence was presented that respondents would refuse to reimburse the union for the reasonable costs of

the union's participation in the event it was required to participate in the arbitration of any grievance on respondents' behalf.

REASONS WHY THE WRIT SHOULD BE DENIED

On December 24, 1980, the President signed HR 4774, amending Section 19 of the NLRA. HR 4774 permits an employee, who is a member of a bona fide religion which has historically held conscientious objections to joining or financially supporting a labor organization, to pay an amount equivalent to union dues to a nonlabor, nonreligious charity, if required by the collective bargaining agreement, in lieu of joining or financially supporting the union. HR 4774 also permits the union to recover the reasonable costs of any grievance-arbitration requested by such employee

from the employee. The legislative history of HR 4774 is clear. In enacting this bill, Congress intended to remove any doubt that the reasonable accomodation requirement of section 701(j) of Title VII of the Civil Rights Act of 1964, 42 USC §2000e-(j)("section 701(j)"), was applicable to union security agreements regardless of any claim of undue hardship by the union. The enactment of HR 4774 effectively moots the issues before this court, there being no possibility of future controversy concerning the union's obligation to comply with the charitable contribution accomodation.

Finally, section 701(j) as applied in this case, is consistent with the Establishment Clause of the First Amendment, there being no economic

benefit to religion or to members of any religious group. Both religious dues objectors and union members incur the same economic detriment, i.e., payment of an equivalent amount to a non-religious, nonlabor charity or to the union.

I. HR 4774 Has Reconciled Any Conflict Between Title VII And The NLRA

Petitioner's first and primary argument in support of the petition is that this court should assume the responsibility of reconciling the allegedly "conflicting" provisions of section 701(j) and section 8(a)(3) of the National Labor Relations Act, 29 USC §158(a)(3) ("section 8(a)"). This issue has been recently resolved by Congress which has amended section 19 of the NLRA to require an accomodation which is virtually identical to the accomodation ordered by

the courts below.

In the congressional debates in support of HR 4774, Representative Clausen, one of the co-sponsors of the bill, made clear his intent that the purpose of HR 4774 was to "reconcile the National Labor Relations Act [and] Section 701(j) of the Equal Employment Opportunity Act." 126 Cong. Rec. H761 (daily ed. Feb. 11, 1980). In his remarks, Representative Clausen reviewed the "court history" of the religious dues objector issue, noting that every federal court of appeals which had considered the issue had ruled that Title VII is applicable to union security agreements where the union security agreement conflicts with religious beliefs. Id at H762-763.

Representative Clausen concluded

his remarks with the following clear statement of legislative intent:

> "The legislative history of the proposed amendment to the National Labor Relations Act indicates that the bills and title VII were meant to be complimentary. The purpose of the previous bill and the purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accomodation which all of the Federal courts of appeal ruling on the issue have found to be an acceptable accomodation under title VII." Id at 763.

Virtually every other member of the House who commented on HR 4774 echoed Representative Clausen's remarks: Id at 760-761 (remarks of Representative Hinson); Id at 760 (remarks of Representative Thompson); Id at 763-764 (remarks of Representative Duncan); Id at 764-765 (remarks of Representative Erlenborn).

Since Congress has itself resolved the "tension and conflict"[2] between section 8(a)(3) and section 701(j), there is no "special and important" reason which would merit the granting of the writ in this case.[3] The writ should be denied.

2/Anderson v. General Dynamics Convair, etc., 589 F2d 397, 400 (9th Cir. 1978), cert. den., 99 S Ct 2848 (1979).

3/Petitioner appears to argue that even though HR 4774 resolves any conflict between Section 8(a)(3) and Section 701(j) with respect to religious dues objectors, there remains a conflict between those statutes with respect to secular dues objectors. See Petition, p. 17 n. 11. The record below does not, however, raise the latter issue, the parties having stipulated that respondents' objections to joining or financially supporting the union are based upon sincerely held religious beliefs and the tenets of the Seventh Day Adventists Church.

II. There Was No Proof Of Undue Hardship Before The Court In This Case

The Federal Courts of Appeal which have considered the religious dues objector issue have unanimously concluded that section 701(j) requires unions to make reasonable accomodations to religious dues objectors in the absence of proof that so doing would cause undue hardship to the union. Anderson v. General Dynamics Convair, etc., supra n.2; Burns v. Southern Pac. Transp. Co., 589 F2d 403 (9th Cir. 1978), cert. den., 99 S.Ct. 843 (1979); McDaniel v. Essex Intern., Inc., 571 F2d 338 (6th Cir. 1978); Cooper v. General Dynamics, Convair Aerospace Div., 533 F2d 163 (5th Cir. 1976); Yott v. North American Rockwell Corp., 501 F2d 398 (9th Cir. 1974), appeal on remand, 602 F2d 904 (9th Cir. 1979).

In the Congressional debates on HR 4774, the various members of Congress commenting on this bill indicated that in so holding, the courts were in fact, reflecting Congress' legislative intent. See 126 Cong. Rec. at H760-765. The accomodation required by HR 4774 does differ in one significant respect from that required by Title VII, section 701(j): HR 4774 contains no "undue hardship" exception, substituting in its stead authorization to labor organizations to recover the reasonable costs of any grievance-arbitration procedure provided at the request of a religious dues objector.

In this case, however, the union would not have been required to permit respondents to pay an amount equivalent to dues to a nonlabor,

nonreligious charity if the union had proved that this accomodation would result in undue hardship to the union. This, the union failed to do.

Even if "undue hardship" results when accomodation costs are more than de minimus,[4] there was no evidence that any increased costs would be incurred by the union or its membership in this case as a result of the accomodation requested by respondents. The union's claim of undue hardship is therefore hypothetical at best.[5] Since

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4/Trans World Airlines v. Hardison, 433 U.S. 63, 84, 97 S.Ct. 2264, 53 L Ed 2d 113 (1977).

5/"Undue hardship cannot be proved by assumptions or even by opinions based on hypothetical facts." Anderson v. General Dynamics, Etc., supra, n.2 589 F2d at 402; see also Trans World Airlines v. Hardison, supra, n.4, 432 U.S. at 84, n. 15.

the inception of this union security agreement, respondents and two other Seventh Day Adventist employees have not, in fact, paid dues to the union, yet in each of the years in question, the union was able to build a substantial reserve against future contingencies, including anticipated grievance arbitrations, without any increase in the dues paid by its members. On this record, the lower courts' determination that the union had failed to establish that the substituted charity accomodation, as applied to the facts in this case, was not clearly erroneous, and the writ should not, therefore, be granted.

III. The Substituted Charity Accomodation Is Not Inconsistent With The Establishment Clause

Petitioner argues that the writ should be granted so that this

court can "harmonize Gillette[6] with the line of cases prohibiting the conferral of 'special economic benefits' on the basis of religion." However, that is not an issue which is raised by this case. The substituted charity accomodation does not confer any direct economic benefit on religion, since respondents were ordered to pay an amount equivalent to dues to the American Cancer Society, a nonreligious, nonlabor charity.[7] Any potential indirect economic benefit to religion is so hypothetical

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6/Gillette v. United States, 401 U.S. 437, 28 L Ed 2d 168, 91 S.Ct. 828 (1971).

7/HR 4774 likewise permits the collective bargaining agreement to require religious dues objectors to pay an amount equivalent to dues to a nonreligious, nonlabor charity.

and remote as to not constitute an establishment of religion. Cf Board of Education v. Allen, 392 US 236, 20 L Ed 2d 1060, 88 S.Ct. 1923 (1968), wherein this court upheld a state law permitting free text books to private school children. The parents of parochial school children were economically benefited by this statute, and conceivably were thereby enabled to contribute more to the particular religious institution to which they belonged. Furthermore, the statute could cause parochial school attendance to increase. This court held that these potential indirect economic benefits did not constitute an establishment of religion. See 20 L Ed2d at 1066.

Nor does the substituted charity accomodation result in any economic benefit to the members of any

religious groups. Both religious dues objectors and union members are required to incur the same economic detriment, i.e., payment of an equal amount either to the union or a nonunion, nonreligious charity. If union dues are increased, respondents' contributions to the American Cancer Society must likewise be increased.[8]

8/Petitioners argue that the accomodation required by the court in this case requires union members to finance the services which the union furnishes to respondents and other religious dues objectors. Assuming for purposes of argument that HR 4774 would not be applicable should the union actually furnish any grievance-arbitration services to any of the respondents, there is no evidence in this case that any of respondents would refuse to reimburse the union for the reasonable cost of the union's participation in a grievance arbitration on his behalf.

The courts below appropriately applied the three pronged test of Committee For Public Education v. Nyquist, 413 US 756, 93 S.Ct. 2955, 37 L Ed 2d 948 (1973)[9] to determine whether section 701(j) was consistent with the Establishment Clause. Both courts concluded that section 701(j) as applied in this case was consistent with the Establishment Clause since it reflects a clearly secular

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9/The Ninth Circuit did note that petitioner's attack on Section 701(j) as applied did present an apparent obstacle to the application of the Nyquist test, as the test normlly requires the examination of the legislation as a whole and the "reasonable accomodation" and "undue hardship" provisions of Section 701 (j) operate uniquely in each case. Therefore, the court utilized the Nyquist test to determine the legitimacy of section 701(j) as applied. 648 F2d at 1245, n. 9.

purpose, has a primary effect that neither advances nor inhibits religion and avoids excessive government entanglement with religion.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 81-572

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, LOCAL 8141,
PETITIONER

v.

HERMAN O. TOOLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether Section 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), which mandates reasonable accommodation of religious practices, requires unions and employers to exempt religious objectors from union dues requirements unless undue hardship would result from such an exemption.

(2) Whether the courts below erroneously considered the union's ability to absorb the costs of accommodating religious practices when they determined whether this accommodation would constitute an "undue hardship" under Section 701(j).

(3) Whether Section 701(j), as applied, violates the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-572

UNITED STEELWORKERS OF AMERICA, LOCAL 8141,
PETITIONER

v.

HERMAN O. TOOLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 648 F. 2d 1239. The opinion of the district court (Pet. App. 15a-21a) is reported at 476 F. Supp. 1027.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1981, and the petition for a writ of certiorari was filed on September 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are set forth in the petition (Pet. 2-4). Also relevant is Section 19 of the National Labor Relations Act, Pub. L. No. 96-593, 94 Stat. 3452 (to be codified at 29 U.S.C. 169), which provides:

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

STATEMENT

1. Herman Tooley, Arnold Bakke, and Edward Helt, who are long-time members of the Seventh-Day Adventist Church and employees of Martin-Marietta Corporation, brought this employment discrimination action in the United States District Court for the District of Oregon. They claimed that Martin-Marietta and the United Steelworkers of America, Local 8141, the bargaining agent for Martin-Marietta's Dallas, Oregon employees, had discriminated against them because of their religion, in violation of Sections 701(j), 703(a) and (c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), 2000e-2(a) and (c), by threatening to terminate their employment because of

their refusal, based on sincerely-held religious beliefs, to pay union dues. R. 1-9.[1]

Tooley, Bakke, and Helt have each worked for Martin-Marietta for more than 15 years, and they are all long-standing members of the Seventh-Day Adventist Church, which teaches that it is morally wrong to be a member of, support, or pay dues to, a labor union (R. 109-126). In October 1976, the company and Local 8141 entered into a collective bargaining agreement which contains a union security clause requiring union membership as a condition of employment (Pet. App. 15a). Plaintiffs then informed the company and union that their religious convictions prohibited them from joining or supporting the union, but they offered to pay, to a mutually acceptable nonreligious charity, an amount equal to the union's dues and initiation fees (*id.* at 15a-16a). However, the union and the company insisted that plaintiffs pay to the union a "service fee" in an amount equal to the dues (R. 83-84). When plaintiffs refused to pay such a fee, they were threatened with discharge (*id.* at 109-126). This action followed.[2]

Martin-Marietta and Local 8141 defended on three grounds: (1) Section 701(j) does not require a union to forego dues payable under a valid union security provision; (2) the requested accommodation would cause "undue hardship" to the union; and (3) Section 701(j) is unconstitutional (R. 66-75). The evidence showed that Local 8141 had 540 members at the time of trial, and the three plaintiffs therefore constituted 0.55% of the bargaining unit (Pet. App. 20a). If plaintiffs were permitted to contribute to charity an amount equal to the union dues, the annual loss

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[1]"R." refers to the record excerpts filed in the court of appeals.

[2]The parties agreed that plaintiffs would not be discharged *pendente lite*, and that they would pay into an escrow account an amount equal to the union dues (Pet. App. 16a).

to the union would be less than $600 (*ibid.*). Three other Seventh-Day Adventists were also included in the bargaining unit, and two of them deposited their dues into the escrow account, while the third continued to pay dues to the union (*ibid.*; R. 23). If all six employees refused to support the union, the annual loss to the union would be less than $1,200 (Pet. App. 20a). The union's income from dues was $28,627 in 1976; $32,517 in 1977; and $45,943 in 1978 (R. 133). The union contributed $2,400 to charity in 1976; $1,872 in 1977; and $2,340 in 1978 (*ibid.*; *id.* at 102-103). The union's receipts exceeded expenditures by $4,696 in 1976, $1,713 in 1977; and $1,729 in 1978 (R. 133; Pet. App. 20a). The union asserted that it was attempting to accumulate a reserve in anticipation of arbitration costs (Pet. App. 20a), although the union's financial secretary testified at trial that the union had never taken a grievance to arbitration (R. 98-101).

2. The district court enjoined Local 8141 and the company from discharging plaintiffs for refusing to pay union dues "as long as [they] make contributions to charity equal to union dues" (Pet. App. 20a).[3] Relying on *Anderson* v. *General Dynamics, Convair Aerospace Division*, 589 F. 2d 397, 400-401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the district court held that the union security agreement could not override the duty created by Section 701(j) to accommodate employees with religious objections to the payment of union dues when such an accommodation may be accomplished without undue hardship (Pet. App. 16a-17a). The court rejected the union's contention that accommodation would cause undue hardship here. The court found, for instance, that the union had accrued sizable budget surpluses during 1976-1978, despite the diversion of dues into an escrow account (*id.* at 20a). The court

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[3]The court also granted attorney's fees to plaintiffs (Pet. App. 22a).

further noted that even if all six of the Company's Seventh-Day Adventist employees refused to pay dues, the union would lose a sum smaller than its annual charitable donations for 1976-1978 (*ibid.*). Given that Local 8141 had never taken a grievance to arbitration, the court was not persuaded by the union's contention that it needed plaintiffs' dues to build reserves for future arbitration costs (*ibid.*). Finally, the court upheld the constitutionality of Section 701(j) under this Court's analysis in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973) (Pet. App. 17a-19a).

3. The court of appeals affirmed.[4] The court adhered to its previous view[5] that Section 701(j) of Title VII creates an exception to the general authorization for union security clauses contained in Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), by mandating that, absent undue hardship, employers and unions must attempt reasonably to accommodate persons whose religious beliefs proscribe union membership or support (Pet. App. 4a).[6] With respect to whether the hardship in this case was

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[4]Only Local 8141 appealed from the judgment of the district court. The court of appeals granted the Commission leave to intervene in this action on June 10, 1980.

[5]See *Anderson* v. *General Dynamics, Convair Aerospace Division*, *supra*, 589 F. 2d at 400-401; *Burns* v. *Southern Pacific Transportation Co.*, 589 F. 2d 403, 405 (1978), cert. denied, 439 U.S. 1072 (1979).

[6]The union contended that dues exemptions are inherently "unreasonable" because they are inconsistent with the national labor policy concerning union security and constitute "preferential treatment" on the basis of religion, contrary to this Court's holding in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). The court rejected both arguments. First, it held that substitution of charitable contributions for union dues payments is "reasonable" under Section 701(j) because it advances the statutory policies of both Title VII and the National Labor Relations Act by allowing the union to enjoy the benefits of a union security agreement while also allowing employees to forego having to make an unnecessary choice between their jobs and their religious

"undue," the court of appeals rejected the union's contention that any evaluation of the union's ability to afford the accommodation was inconsistent with the *de minimis* standard set forth in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). The court below reaffirmed that hardship must be assessed in " 'the particular factual context of each case' " (Pet. App. 7a, quoting *Anderson* v. *General Dynamics, Convair Aerospace Division, supra*, 589 F. 2d at 400), and noted that this approach was consistent with *Hardison* (Pet. App. 7a n.7). The court of appeals upheld, as not clearly erroneous, the district court's finding that the union's activities would not be impaired, and thus it would suffer no undue hardship by accommodating plaintiffs (*id.* at 7a-8a). Finally, the court of appeals upheld the constitutionality of Section 701(j), as applied, under the three-part test articulated in *Committee for Public Education* v. *Nyquist, supra*, 413 U.S. at 772-773. The court concluded (Pet. App. 8a-14a) that: (1) the statute has a secular purpose—"to promote Title VII's broader policy of prohibiting discrimination in employment"; (2) the primary effect of the particular accommodation at issue here—the charity substitution—is not to advance religion but merely to "allow[] the plaintiffs to work without violating their religious beliefs, at a cost equivalent to that paid by their

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convictions (*ibid.*). The court noted that its conclusion was also generally supported by the December 1980 amendment of Section 19 of the NLRA—prescribing charity substitution for religious objectors to union sponsorship—and the amendment's legislative history (Pet. App. 4a-5a). Second, the court held that the charity substitution accommodation did not accord plaintiffs "preferential treatment" in contravention of *Hardison*. The court noted that *Hardison* interpreted Section 701(j) to forbid only those accommodations that either require employees to relinquish express contractual rights or confer a privilege (the cost of which is more than *de minimis*) on the basis of religion (Pet. App. 5a-6a). The court found no inconsistency between *Hardison* and a rule permitting the contribution to charity of an amount equal to union dues, where undue hardship would not result (Pet. App. 6a).

co-workers without similar beliefs"; and (3) the implementation of the accommodation does not require the government to become impermissibly entangled with religion.[7]

ARGUMENT

Every court of appeals that has addressed the question has held that Section 701(j) of Title VII, 42 U.S.C. 2000e(j), requires that unions and employers exempt employees who object, on religious grounds, to the payment of union dues, unless such an accommodation would constitute undue hardship.[8] Not only is there no conflict among the circuits, but the issue lacks prospective importance because in December 1980, Congress amended Section 19 of the National Labor Relations Act, 29 U.S.C. 169, to create a significantly broader exemption for persons who object on religious grounds to the payment of union dues, and thereby readjusted the relationship between the provisions of Title VII and the National Labor Relations Act. Further review is therefore unwarranted at the present time.

1. a. As the court of appeals correctly held, Section 701(j) requires that employers and unions[9] accommodate

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[7]The court held (Pet. App. 8a n.8) that the constitutionality of Section 701(j), as applied here, was not governed by *Rankins* v. *Commission on Professional Competence*, 24 Cal. 3d 167, 593 P. 2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979), because "this case and *Rankins* involve entirely different kinds of religious accommodations, [and] the constitutional dimension of each is necessarily different."

[8]See *Anderson* v. *General Dynamics, Convair Aerospace Division*, *supra*, 589 F. 2d at 400-401; *Burns* v. *Southern Pacific Transportation Co.*, *supra*, 589 F. 2d at 405; *Nottelson* v. *Smith Steel Workers, D.A.L.U. 19806*, 643 F. 2d 445, 450-451 (7th Cir. 1981), petitions for cert. pending, Nos. 81-97 and 81-323; *McDaniel* v. *Essex International, Inc.*, 571 F. 2d 338 (6th Cir. 1978); *Cooper* v. *General Dynamics, Convair Aerospace Division*, 533 F. 2d 163, 169-170 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977).

[9]Although Section 701(j) does not specifically refer to *union* accommodation of employee religious practices, the union's obligation is based on Section 703(c)(1) of Title VII, 42 U.S.C. 2000e-2(c)(1) (a labor

"*all aspects* of [employee] religious observance and practice" (Section 701(j) of Title VII, 42 U.S.C. 2000e(j); emphasis added). The plain language of the statute "indicates that it applies to all religious observances and practices and is not limited to claims of discrimination based on requirements of Sabbath work." *McDaniel* v. *Essex International, Inc., supra*, 571 F. 2d at 342; *Cooper* v. *General Dynamics, Convair Aerospace Division, supra*, 533 F. 2d at 168. Cf. *Redmond* v. *GAF Corp.*, 574 F. 2d 897, 900 (7th Cir. 1978) ("we note that the very words of the statute * * * leave little room for * * * a limited interpretation").[10] Because the

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organization may not "exclude or * * * expel from its membership, or otherwise to discriminate against, any individual because of * * * religion * * *"); on Section 703(c)(2) of Title VII, 42 U.S.C. 2000e-2(c)(2) (a labor organization may not "limit, segregate, or classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's * * * religion * * *"); and on Section 703(c)(3) of Title VII, 42 U.S.C. 2000e-2(c)(3) (a labor organization may not "cause or attempt to cause an employer to discriminate against an individual in violation of this section").

[10]Local 8141 relies (Pet. 12) on a statement made in the Commission's Sixth Annual Report, which was published on March 30, 1972, to show that the Commission did not then construe Section 703(a) of Title VII, the statute's basic prohibition of religious discrimination, to make illegal the discharge of a person whose religious convictions proscribed payment of union dues. However, the statement upon which Local 8141 relies merely described a Commission determination that occurred in 1971, before the enactment of Section 701(j). We also note that this 1971 Commission determination was not contemporaneously reported by the unofficial reporting services, and the Commission does not believe that the determination was generally available until the publication of the Sixth Annual Report, following the enactment of Section 701(j). Although the Commission had previously promulgated a guideline (29 C.F.R. 1605.1(b) (1967)) similar to Section 701(j), the Commission did not believe that its guidelines could create an exception to the National Labor Relations Act. However, such an exception was expressly created by Congress in 1972, when it enacted Section 701(j).

legislative history of Section 701(j) is devoid of "firm evidence [to show] that the [section] cannot mean what it so clearly seems to say" (*Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 361 (1977)), there is no good ground for contending that the equal employment opportunity guaranteed by Section 701(j) to all religious practitioners should somehow be limited.[11]

b. Local 8141 seeks to avoid the broad sweep of Section 701(j) by arguing (Pet. 13-18) that Congress' consideration of legislation to amend the National Labor Relations Act, with respect to the payment of union dues by religious objectors, shows that Congress did not intend Section 701(j) to apply in this area.[12] Thus, the union attempts to demonstrate Congress' intent in enacting Section 701(j) by canvassing (see Pet. 14-16) the legislative history of these proposed amendments to the NLRA. That legislative history is singularly unhelpful, however, because it neither contains any reference to Section 701(j) nor provides any explanation for this omission. Moreover, the union's reliance on post-enactment "legislative history" is incomplete at best because it ignores the legislative history of the

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[11]Cf. *Phillips Co.* v. *Walling*, 324 U.S. 490, 493 (1945) (exemptions from humanitarian and remedial legislation must be narrowly construed, giving due regard to the plain meeting of statutory language and the intent of Congress); *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979) (exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole).

[12]Among other things, this argument ignores the difference in scope between Section 701(j) and the proposed NLRA amendments. For instance, unlike Section 701(j), the proposed NLRA amendments (see Pet. 16-17 & n.11), including those enacted in 1974 and 1980, did not contain an undue hardship defense, and thus required exemption for religious objectors regardless of the resulting hardship to the union. Congressional action or inaction with respect to these significantly different bills is therefore irrelevant to the meaning of Section 701(j).

December 1980 amendment to Section 19 of the NLRA.[13] As the court below recognized (Pet. App. 4a-5a), the sponsors of that amendment, who cited with approval the relevant prior decisions of the court of appeals, clearly indicated their understanding that Section 701(j) of Title VII also provides protection to union dues objectors.[14] Thus, in

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[13]Congress amended Section 19 of the NLRA on December 24, 1980 (see Pub. L. No. 96-593, 94 Stat. 3452) to provide a broad exemption from the payment of union dues or fees for employees belonging to a "bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations." The law provides that such objectors may be required by a bargaining agreement to contribute a sum equal to union dues and fees to a nonreligious charity and also to pay costs incurred by unions in pursuing grievance—arbitration procedures where these are undertaken at the objector's request.

[14]See 126 Cong. Rec. S16616 (daily ed. Dec. 13, 1980) (remarks of Senator Melcher); 126 Cong. Rec. H760 (daily ed. Feb. 11, 1980) (remarks of Rep. Thompson: "[T]he bill would make the National Labor Relations Act consistent with section 701(j)" and the "option of allowing a qualifying individual the right to pay the equivalent of [union] dues to a nonreligious charity clearly constitutes a 'reasonable accommodation' to the individual's religious benefits."); *ibid.* (remarks of Rep. Hinson: The "legislation reflects an accommodation among constitutional principles; the basic rights protected in Title VII * * * [and] the rights created by the National Labor Relations Act * * *."); *id.* at H763 (remarks of Rep. Clausen: "[T]he purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the Federal courts of appeals ruling on the issue have found to be an accommodation acceptable under Title VII."); *ibid.* (remarks of Rep. Duncan: "The conscience amendment reconciles * * * the National Labor Relations Act and the * * * reasonable accommodation section, 43 USCA 2000e(j) [*sic*]."); *id.* at H764 (remarks of Rep. Erlenborn: "[T]his bill accepts the principles of religious liberty as guaranteed by our Constitution and implemented by the Equal Employment Opportunity Act.").

Given Congress' clearly expressed understanding that Section 701(j) is applicable to union dues cases, the union's reliance (Pet. 18) on *Teamsters* v. *Daniel*, 439 U.S. 551 (1979), is simply misplaced. In *Daniel*, the Court found that neither the language nor the legislative history of the federal securities laws supported the extension of their

Congress' view, Section 701(j) complements Section 19 of the NLRA as a means of accommodating persons whose religious convictions against union sponsorship would needlessly deprive them of their jobs.[15]

c. Finally, the court of appeals' holding that Section 701(j) affords some protection to employees who object on religious grounds to the payment of union dues is fully consistent with the well-established principles that our "national labor policy embodies the principles of nondiscrimination as a matter of highest priority." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Emporium Capwell Co.* v. *Community Organization*, 420 U.S. 50, 66

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coverage to include noncontributory pension plans and, furthermore, that the legislative history surrounding the subsequent enactment of ERISA demonstrated that Congress understood the later statute to be filling a regulatory void (439 U.S. at 569-570). In contrast, there is no question here concerning any extension of the language of Section 701(j), which need merely be applied in terms to protect union dues objectors. Likewise, the legislative history surrounding the enactment of the later NLRA amendment also clearly shows that Congress meant to complement what it understood to be the protection already afforded by Title VII.

[15]The fact that the two sections are different hardly supports the union's contention (Pet. 18) that Section 701(j) "confounds the solution" that Congress provided in Section 19. See also Pet. 17-18 & nn.11, 12. Indeed, if this contention were valid, one would expect that Congress would have disavowed, rather than confirmed, the applicability of Section 701(j) to union dues cases. In fact, the alleged differences—except for the different enforcement mechanisms and the absence of an undue hardship defense under the NLRA—appear to be inconsequential as a practical matter. Moreover, it is reasonable to expect (because of the absence of an undue hardship defense in Section 19) that most union dues objectors will in the future invoke the protection of the NLRA rather than Title VII, assuming that both statutes are applicable. But see Section 2 of the NLRA, 29 U.S.C. (& Supp. III) 152. At the present time, of course, the full meaning of Section 19 of the NLRA remains untested by litigation. If difficulties should arise in the future in harmonizing these two statutes, the Court may then wish to consider the question, but such consideration now would be prematu e.

(1975). See *McDaniel* v. *Essex International, Inc., supra*, 571 F. 2d at 343; *Anderson* v. *General Dynamics, Convair Aerospace Division, supra*, 589 F. 2d at 400-401. Petitioner stands this principle on its head by contending that Congress' general (and earlier) authorization of union security arrangements in the NLRA shows that Congress did not intend, despite the broad language used in Section 701(j), to allow even minor modifications of such arrangements when they discriminate against individuals whose deeply-held religious beliefs prevent them from paying union dues. To the contrary, the modifications permitted under Section 701(j) are the most limited of several exceptions that Congress has created with respect to union security agreements.[16] Section 701(j) is therefore consistent with Congress's general view that the overall policy in favor of union security agreements is subject to modification when it conflicts with other important public policy considerations.

Moreover, contrary to the union's contention (Pet. 12-14), its argument is not supported by *Trans World Airlines, Inc.* v. *Hardison, supra*, in which this Court held only that "[w]ithout a clear and express indication from Congress, we cannot agree * * * that an agreed-upon *seniority system* must give way when necessary to accommodate religious observances * * *" (432 U.S. at 79; emphasis added). In Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), Congress accorded special status to bona fide seniority systems and,

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[16]For instance, under Section 14(b) of the NLRA, 29 U.S.C. 164(b), such agreements are unenforceable in states with laws prohibiting them. See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746 (1963). Similarly, prior to its amendment in December 1980, Section 19 of the NLRA, 29 U.S.C. 169, provided that employees of health care institutions with religious objections to the payment of union dues had an absolute right to contribute the equivalent of dues to charity, regardless of whether undue hardship resulted. The December 1980 amendment has extended that right to all employees, provided that they pay the cost of any grievance-arbitration procedures that they might invoke.

for that reason, Section 701(j) could not invalidate a bona fide seniority system "even if the system has some discriminatory consequences" (432 U.S. at 82). However, Title VII contains no such exception relating to bona fide union security arrangements, and Section 701(j)'s mandate of reasonable accommodation of "all aspects of religious observance" must therefore extend to religious objections to dues payments.[17]

2. The district court held (Pet. App. 19a-20a) that the union would suffer no undue hardship if all identified Seventh-Day Adventist employees at the Martin-Marietta plant were allowed to contribute to charity an amount equal to what they would otherwise have been required to pay in union dues. The court found that the union could easily absorb the maximum possible loss of dues that might result annually—$1,200—in view of the fact that the union had experienced budget surpluses totaling $8,138 for the years 1976 through 1978, although the dues of five employees had been paid into an escrow account and the union's annual charitable contributions exceeded $1,800. However, in view of the undisputed evidence that Local 8141 had never taken a grievance to arbitration, the court would not credit the union's claim that the diversion of dues would prevent it from being able to finance future arbitration cases.[18]

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[17]To the extent that *Hardison* may be construed as requiring a " 'clear and express indication from Congress' " that any accommodation which impacts on national labor policy is "reasonable", the court below correctly recognized (Pet. App. 6a n.5) such an indication in the December 1980 NLRA amendment, which prescribes the charity substitution as an accommodation for persons whose religious convictions prevent compliance with union security agreements.

[18]The court's analysis was wholly consistent with the Commission's guidelines (29 C.F.R. 1605.1, as amended, 45 Fed. Reg. 72610 (1980)), which require that regard be given to the relationship between identifiable accommodation costs and the size and operating expenses of the union, in determining whether a particular hardship is "undue".

Petitioner's contention (Pet. 19-20) that this method of assessing hardship is unfaithful to *Trans World Airlines, Inc.* v. *Hardison, supra*, is based on the mistaken notion that the Court there decided, as a matter of law, that $150 constitutes more than "*de minimis*" cost. However, while the Court there held that TWA would have been put to undue hardship by having to pay premium wages to replacement employees, so as to accommodate Hardison's Sabbatarian beliefs, the Court nowhere identified the projected cost of the accommodation. Instead, this Court expressly deferred to the trial court's finding on this issue and, significantly, further indicated that it was the precedent-setting effect of the accommodation, in view of the likelihood that an unknown number of other employees would seek similar relief, that rendered the accommodation costs more than *de minimis* (432 U.S. 84 & n.15). What was at stake in *Hardison* was nothing less than the value of the seniority system itself: "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others * * *" (*id.* at 81). By contrast, Justice Marshall's dissent focused on the financial impact of accommodating Hardison alone, thus finding relatively inconsequential the projected cost—$150 in wages over a three-month period, at the end of which Hardison would presumably have been eligible to transfer back to his former department and shift (432 U.S. at 92 n.6 (Marshall, J., dissenting)). However, the majority (432 U.S. at 83 n.14) took issue with the dissent for "advancing its own view of the record" and emphasized that the evidence showed that Hardison could *not* regain his seniority shift preference by returning to his previous department.

Read together, the majority and dissenting opinions in *Hardison* show that the holding was based on the view that, because Hardison had lost his seniority shift preferences, the premium wages to be paid to his Saturday shift replacement would greatly exceed $150. Most significant, however, is the Court's implicit suggestion (432 U.S. 84 n.15) that the question whether the costs of a proposed accommodation would be more than *de minimis* is to be determined in light of the projected number of instances in which an employer would likely be asked to make such accommodations. In contrast to *Hardison* (where the accommodations were presumably numerous because of the highly open-ended demand that hours be adjusted in various ways to suit many various religious beliefs), the number of accommodations here involves no more than six of the 540 employees in the bargaining unit. There is thus no merit to the union's contention that the court below improperly considered the union's ability to absorb the accommodation costs involved here, rather than merely holding as a matter of law that the costs were more than *de minimis* because they exceed $150.

3. Finally, the union contends (Pet. 20-22) that Section 701(j) is unconstitutional as applied here because it closely resembles laws that this Court has previously found to violate the Establishment Clause of the First Amendment because they confer special economic benefits on religious institutions.[19] There is no merit to this contention. The cases on which petitioner relies involved laws whose intended consequences were to preserve and support religion through

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[19]Only this constitutional argument will be discussed here because we have otherwise fully discussed the constitutionality of Section 701(j) in our brief in opposition in *A.O. Smith Corp.* v. *Nottelson*, Nos. 81-97 and 81-323 (filed Oct. 16, 1981), and we have served copies of that brief on the parties here.

massive financial aid to sectarian institutions. See *Meek* v. *Pittenger*, 421 U.S. 349, 363-366 (1975); *Committee for Public Education* v. *Nyquist, supra*, 413 U.S. at 780-789; *Sloan* v. *Lemon*, 413 U.S. 825, 828-833 (1973). The accommodation in this case does not involve diversion of union funds to support religious institutions or religious activities of any sort. Neither plaintiffs—who experience the same out-of-pocket expenses as their co-workers—nor their church receive any economic benefit.

Legislation passes muster under the Establishment Clause if its "primary effect" is neither to advance nor inhibit religion (*Committee for Public Education* v. *Nyquist, supra*, 413 U.S. at 773; *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971)) through " 'sponsorship, financial support, [or] active involvement of the sovereign in religious activity.' " *Wisconsin* v. *Yoder*, 406 U.S. 205, 234 n.22 (1972). As applied here, Section 701(j) clearly passes this test because it does nothing that this Court has previously found to violate the Establishment Clause. Indeed, by extending equal employment opportunity to a class of individuals whose religious observances would otherwise needlessly cost them their jobs, Section 701(j) no more "benefits" or "advances" religion than have other state accommodations of religious practices that have repeatedly been upheld by this Court. See, *e.g.*, *Wisconsin* v. *Yoder, supra*, 406 U.S. at 234-235 n.22; *Gillette* v. *United States*, 401 U.S. 437, 453, 461 n.23 (1971); *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963); *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, LOCAL 8141,
Petitioner,

v.

HERMAN O. TOOLEY, EDWARD J. HELT, ARNOLD G. BAKKE, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

I. THE DIFFERENCES BETWEEN THIS CASE AND *SMITH STEEL WORKERS v. NOTTELSON.*

In the petition (Pet. 9 n.3) we noted that certain of the questions presented herein were also presented in *Smith Steel Workers v. Nottelson*, No. 81-323. This Court has subsequently denied the petitions for certiorari in *Smith*, Justices Brennan and Marshall dissenting, 50 U.S.L.W. 3376 (Nov. 9, 1981). This case, as we also pointed out in the petition (*ibid*), presents a question not presented in *Smith*, and differs from that case in material respects.

In *Smith*, there was but one religious dues objector among 4,900 employees, and the amount of dues at issue ($10 per month, representing two-tenths of one percent of the union's dues receipts) was found by the lower

courts to be "a *de minimis* cost" (Supp. App. in No. 81-97, p. B-14). There was "no evidence that many workers other than plaintiff would seek a similar accommodation due to their religious beliefs" (*id.*, pp. B-14-15). The union had acknowledged that it would not be harmed by the loss of the plaintiff's dues (App. in No. 81-97, p. A-10). The union did not seek review in this Court of the holding that it would suffer no "undue hardship" within the meaning of § 701(j) if required to exempt the plaintiff from dues payments.

In the instant case, there are five religious dues objectors already withholding dues from the union, and a sixth who might do so, in a workforce ranging from 350 to 540 employees. The amount of dues at issue (nearly $1,200 per year) equals 3% to 5% of the union's total annual receipts. The union did not disclaim potential harm from the loss of the objectors' dues, but, on the contrary, testified that those dues were needed to create a reserve to pay future arbitration costs.

In short, this case presents, as *Smith* did not, a question in this Court as to the meaning of § 701(j)'s "undue hardship" standard. And as we have shown, the courts below resolved that question in a manner that cannot be squared with this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63.

Moreover, with respect to the question whether absent "undue hardship" § 701(j) requires exemption of religious dues objectors—a question presented both in *Smith* and the instant case—the EEOC urged in *Smith* that if the Court thought the issue worthy of review it should await "a case in which the lower courts have considered the significance of the [1980 NLRA] amendment" (EEOC Br. in Nos. 81-97 and 81-323, p. 12 n.11). In the instant case, unlike *Smith*, the court of appeals *did* discuss the significance of the 1980 NLRA amendment in its opinion (App. 4a-5a, 6a n.5).

On both these counts we submit that despite the denial of certiorari in *Smith* the instant case warrants this Court's attention.

II. THE RELATIONSHIP BETWEEN TITLE VII AND THE NLRA.

a. Respondent EEOC acknowledges that although it had construed Title VII to impose a duty of reasonable accommodation prior to the 1972 amendments, it had understood that duty not to require unions to exempt religious objectors from dues obligations under union security agreements (EEOC Br. 8 n.10). But the EEOC contends that its pre-1972 construction is not informative of the meaning of the almost identically-worded "reasonable accommodation" duty expressly enacted by Congress in the 1972 amendments to Title VII:

> [T]he Commission did not believe that its [pre-1972] guidelines could create an exception to the National Labor Relations Act. However, such an exception was expressly created by Congress in 1972, when it enacted Section 701(j). [*Ibid.*].

But 701(j) does not "expressly" create such an exception; the issue is whether the general language of § 701(j) should be construed as impliedly repealing the Congressional decision in the NLRA to permit agreements requiring uniform financial support of collective bargaining representatives by the represented employees. And the rationale proffered by the EEOC for construing § 701(j) differently than it had construed the pre-1972 Act will not wash.

The pre-1972 EEOC guidelines did not purport to *invent* a duty of reasonable accommodation; rather, those guidelines purported to find that duty in the nondiscrimination command of Title VII as enacted in 1964. If that construction of the 1964 Act was correct, Congress was as much the source of power for compelling "reasonable accommodation" under the 1964 Act as

under the 1972 Act. And as Congress' sole objective in enacting § 701(j) in 1972 was "to resolve by legislation" the lower courts' doubts that the EEOC had in its guidelines correctly divined the will of the 1964 Congress, *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 73-74, there is no justification for reading into § 701(j) a command of greater accommodation than the EEOC had required under the 1964 Act. In particular, given the absence of a single reference to the subject of union dues in the 1972 legislative history, there is no reason to attribute to the 1972 Congress an intent to override the NLRA on this subject when no such intent had actuated the 1964 Congress.

b. Both respondents invoke the much-later debates surrounding the 1980 amendment to the NLRA to support their construction of Title VII (EEOC Br. 9-11; Tooley Br. 11-13). (In the case of EEOC, this invocation is made despite an acknowledgement that the 1980 NLRA amendment adopts a different substantive standard than that claimed for § 701(j) (EEOC Br. 7, 9 n.12, 10 n.13, 11 n.15).) Neither respondent suggests that these debates are informative of what *the Congress of 1972* intended in enacting § 701(j); rather, all that respondents claim that these debates show is that the 1980 Congress was aware that after 1972 the courts of appeals had construed § 701(j) to require exemption of religious dues objectors (see, e.g., the remarks of Representative Clausen quoted at Tooley Br. 12). In determining the meaning of § 701(j), "[i]t is the intent of the Congress that enacted [§ 701(j)] in [1972], unmistakable in this case, that controls." *Cf. Teamsters v. United States*, 431 U.S. 324, 354 n.39.[1]

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[1] The Tooley respondents also state that the 1980 NLRA amendment "effectively moots the issues before this Court" (Tooley Br. 9). This case is not moot for three reasons: (1) the union has

c. In our petition, we relied on the holding of *Hardison*, *supra*, 432 U.S. at 79, that absent "a clear and express indication from Congress" § 701(j) should not be construed to impliedly repeal core principles of national labor policy articulated in the NLRA. The EEOC asserts that the declaration in *Hardison* was confined to seniority systems, and was premised on the explicit protection afforded seniority systems in Title VII itself (EEOC Br. 12-13). That is a misreading of *Hardison*. The holding in question appears in Part B(1) of that opinion, 431 U.S. at 79, and is not at all linked (or confined) to the special status accorded seniority systems. In a separate portion of the opinion, Part B(2), the Court declared, as an alternative or additional basis for its holding, that the conclusion reached in Part B(1) "is supported by the fact that seniority systems are afforded special treatment under Title VII itself," *id.* at 81.[2]

d. The EEOC further argues:

> To the extent that *Hardison* may be construed as requiring a " 'clear and express indication' " that any accommodation which impacts on national labor policy is "reasonable," the court below correctly recognized (Pet. App. 6a n.5) such an indication in the December 1980 NLRA amendment, which prescribes the charity substitution as an accommodation. [EEOC Br. 13 n.17.]

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been enjoined from collecting dues that were owed for periods prior to 1980; (2) the union is under a continuing injunction in this case that is broader in terms than § 19 of the NLRA as amended in 1980 (the injunction, Pet. App. 22a, does not authorize the union, as § 19 does, to "charge" religious dues objectors the reasonable cost of using the grievance-arbitration procedures on their behalf); and (3) Section 19 is itself subject to challenge under the Establishment Clause.

[2] The EEOC also argues that our reliance on national labor policy is unwarranted because prior to 1972 Congress had expressly provided certain exceptions to union security in the NLRA (EEOC Br. 12 and n.16). But that Congress prior to 1972 had made *other* exceptions to the authorization of union security clauses in the NLRA, but *not* an exception for religious dues objectors, proves our point, not the EEOC's.

This, of course, is a *non sequitur*. That Congress thought such an accommodation reasonable in December, 1980 does not mean that it thought so in 1972 when § 701(j) was enacted; on the contrary, the contemporaneous evidence shows unmistakably that Congress in 1972 did *not* think such an accommodation reasonable (Pet. 13-16).

III. THE MEANING OF "UNDUE HARDSHIP".

The EEOC concedes that, as we contend, the court below has adopted a definition of "undue hardship" that is not constant but rather turns upon "the union's ability to absorb the costs" (EEOC Br. at I; see also *id.* at 6: "the union's ability to afford the accommodation"). In this case, the EEOC says, the union's undue hardship claim was rejected because "[t]he court found that the union could easily absorb the maximum possible loss of dues that might result annually—$1,200" (*id.* at 13).

While the EEOC attempts to distinguish *Hardison* on its facts (EEOC Br. 14-15), the EEOC does not suggest (as it cannot) that the existence of "undue hardship" in *Hardison* was thought by this Court to turn on TWA's "ability to afford the accommodation." If we are right that this Court in *Hardison* adopted an objective standard of undue hardship ("more than *de minimis*") that does not turn on the particular defendant's "ability to afford the accommodation," the inconsistency between the decision below and *Hardison* is apparent. And as the EEOC has in recent guidelines embraced the approach taken by the court below—requiring that "regard be given to the relationship between identifiable accommodation costs and the size and operating expenses of the union, in determining whether a particular hardship is 'undue'," EEOC Br. 13 n.18—the matter is one of general importance to the administration of Title VII.[3]

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[3] Developments in this case reflect the unworkability in any event of the standard adopted below. The EEOC would have it that the union's claim of undue hardship was defeated by a credibility ruling: "in view of the undisputed evidence that Local 8141

IV. THE CONSTITUTIONAL ISSUE.

a. Both respondents contend that § 701(j) as construed below does not provide religious dues objectors a monetary preference, because they must contribute an amount equal to dues to charity (EEOC Br. 16; Tooley Br. 18-20). This contention ignores (i) that many persons make charitable contributions in any event, so that under the construction below many dues objectors *will* receive a monetary benefit, in contrast to other employees who will have to make charitable contributions *in addition to* their dues payments; and (ii) that those who would have *secular* preferences for making charitable contributions in lieu of paying union dues are denied this option, which is made available to religious objectors solely on the basis of their religion.

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had never taken a grievance to arbitration, the court would not credit the union's claim that the diversion of dues would prevent it from being able to finance future arbitration cases" (EEOC Br. 13). But neither lower court purported to make that credibility ruling, and in any event it would be absurd: that a newly-certified union representing a few hundred employees had not taken a grievance to arbitration in its first two years hardly established that it would not have occasion to take grievances to arbitration thereafter.

More importantly, judicial undertakings to predict unions' needs for "reserves" are by their nature hazardous. Indeed, the entire reserve accumulated by the union in this case—upon which the lower courts relied in determining that the union did not *need* plaintiffs' dues (App. 6a, 20a)—will be insufficient to pay the attorneys' fees awarded in this case: $5,000 in the district court, Pet. App. 22a, and $6,662 in the court of appeals (App. printed herewith). As the union now has a demonstrable (albeit unforeseen) "need" for the plaintiffs' dues, is it to apply for a modification of the injunction for so long as necessary to restore its financial health? As this instance demonstrates—and others, such as strikes, litigation costs, etc., can as easily be imagined—a construction of "undue hardship" that turns upon the defendant's "ability to absorb the costs" would place employers and unions in a sort of permanent receivership, having continually to make application to the federal courts whenever they *need* dues from religious objectors to pay their bills. These bizarre consequences do not attend the construction that we understand this Court to have given § 701(j) in *Hardison*.

b. The EEOC contends that even if a monetary preference *does* result from the construction of § 701(j) by the court below, that preference does not constitute "diversion of union funds to support . . . religious activities of any sort" (EEOC Br. 16). But the EEOC overlooks that the very "religious activity" that is the subject of this case is the withholding of money from unions. As construed below, § 701(j) requires unions to furnish free representation to those who wish to engage in this "religious activity," thus compelling unions (and ultimately the other members whose dues must subsidize the religious objectors) to "support" this "religious activity."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-3029

DC# CV-C76-933

HERMAN, O. TOOLEY, EDWARD J. HELT and ARNOLD G. BAKKE,
Plaintiffs-Appellees,

vs.

MARTIN-MARIETTA CORPORATION, a corporation; and UNITED STEEL WORKESR OF AMERICA, LOCAL 8141,
Defendants-Appellants.

ORDER

Before: HUG, TANG and FARRIS, Circuit Judges.

Upon due consideration, the court awards appellees $94.30 for reproduction of briefs and Six Thousand Six Hundred and Sixty Two Dollars and Fifty cents ($6,662.50) for attorney fees under 42 U.S.C. § 2000e-5(k) for a total award of Six Thousand Seven Hundred and Fifty Six Dollars and Eighty cents ($6,756.80).

That amount is awarded.

CLERK, U.S. COURT OF APPEALS

Filed Sep. 23, 1981, Clerk, U.S. Court of Appeals